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In The Supreme Court of the United States

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, and CURTIS HAZELL,

Petitioners,

v.

DAVID ENG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the inquiry into whether a public employee's speech was within the scope of his or her "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) present a pure question of law for the court, as determined by a majority of circuits, or a mixed question of fact and law to be submitted in the first instance to a jury, as determined by the Ninth Circuit?

2. What criteria must be applied in determining whether a public employee's speech was within the scope of his or her official duties?

3. Absent specific criteria for determining when public employee speech is pursuant to an official duty, are supervisors shielded by qualified immunity for allegedly concluding they could discipline a deputy district attorney for comments made during a meeting with the District Attorney and his executive staff on matters relating to a task force investigation of which he was a part, although the comments were not within the scope of his particular assignment?

4. What is the scope of the First Amendment interest a public employee may have, if any, in an interview given by his or her attorney to the press about the public employee's dispute with his employer?

PARTIES TO THE PROCEEDINGS

Petitioners (defendants and appellants below):

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, and CURTIS HAZELL

Respondent (plaintiff and appellee below):

DAVID ENG

In addition, the County of Los Angeles is a defendant in the underlying action and was a nominal appellant below, although no appellate argument was presented on its behalf. David Torres was a defendant below, but was not a party to the appeal.

There are no corporations involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Steve Cooley, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 552 F.3d 1062 (9th Cir. 2009) and is reprinted in the Appendix to this petition ("App.") at 1-34. The court's order denying rehearing and rehearing en banc is unreported. App. 54-55. The order of the United States District Court for the Central District of California denying petitioners' motion for summary judgment is unreported. App. 35-53.

JURISDICTION

The Ninth Circuit issued its decision on January 14, 2009. App. 1. Petitioners were granted an extension of time to February 4, 2009 to file a petition for rehearing. Their petition for rehearing and rehearing en banc was denied on March 26, 2009. App. 54-55. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On April 12, 2005, respondent David Eng ("Eng") filed a complaint alleging, *inter alia*, a violation of his civil rights under 42 U.S.C. § 1983 and naming as defendants Los Angeles County District Attorney Steve Cooley and a number of then current and former supervisory employees in the District Attorney's Office, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell, among others. The operative second amended complaint, filed July 5, 2006, alleged that Eng, a deputy district attorney, had been demoted, suspended without pay, subjected to criminal prosecution, and upon return to work, passed over for promotion. These acts were allegedly in retaliation for Eng's exercise of his right to free speech under the First Amendment. Specific instances of speech for which Eng claimed protection under the First Amendment were as follows:

- As a member of a Task Force investigating the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex ("Belmont"), Eng had recommended no criminal charges for violations of environmental laws be filed against anyone associated with Belmont;

- During a meeting with the District Attorney and his executive staff at which Eng had presented his recommendation, he had been critical of leaks to the Internal Revenue Service ("IRS") by another Task Force member to the

effect that the use of Certificates of Participation for financing the purchase of the Belmont property was fraudulent, with the effect that the school district would lose its tax-exempt status, when in Eng's view the use of these Certificates of Participation was legal; he had argued too that the District Attorney should remedy the damage the improper leak to the IRS had caused;

- Eng's attorney had been interviewed by the *Los Angeles Times*, which thereafter published an article entitled, "Cooley is Accused of Payback Prosecution" in which the attorney alleged Eng had been set up for prosecution as retaliation for his conclusion that no crimes had been committed with respect to Belmont, and for criticizing the improper involvement of the IRS in the investigation of Belmont.

Petitioners moved for summary judgment. Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), they contended that Eng's recommendation against criminal charges and his comments about the leaks to the IRS fell within the scope of his duties, and thus were not protected by the First Amendment. Petitioners further contended they were entitled to qualified immunity because of the absence of clearly established law as to whether Eng's on-the-job speech was protected.

As to the attorney's statements to the *Los Angeles Times*, petitioners contended they were entitled to qualified immunity because of the absence of clearly established law as to whether Eng could assert a First Amendment claim with regard to the speech of his attorney. Earlier in the litigation, the district court, Judge Margaret M. Morrow, had ruled that Eng had third-party standing to assert a claim for violation of his attorney's First Amendment rights. *See* App. 49.

In opposing the summary judgment motion, Eng focused primarily on his comments about the leak to the IRS, contending that although members of the Task Force were not prohibited from working on any aspect of the Belmont investigation, he was not "duty-bound" to report on misconduct by fellow members of the Task Force, since the focus of his assignment had been environmental crimes. He did not address the issue of qualified immunity either in relation to his comments about the leak or his attorney's statements to the press.

The district court, Judge Otis D. Wright, II, denied petitioners' motion for the most part. It determined that Eng's recommendation against filing criminal charges for environmental crime was part of his job and hence not protected. App. 48. However, it ruled there was a genuine issue of fact as to whether the statements Eng made regarding the leak to the IRS were part of his job or whether he was speaking as a private citizen on a matter of public concern. App. 49. Further, Judge Wright agreed with Judge

Morrow that Eng could assert a third-party claim based on the violation of his attorney's right to free speech. App. 49-50. The court denied qualified immunity, stating simply, "First Amendment protection is a clearly established constitutional right." App. 50.

Petitioners appealed the denial of qualified immunity. On January 14, 2009, the Ninth Circuit affirmed. Citing *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129-30 (9th Cir. 2008), the court held that for purposes of analyzing whether an employee's speech is protected, the question of whether a statement falls within an employee's job duties presents a mixed question of fact and law. App. 20 ("While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found is a question of law'"). The district court's finding of a genuine issue of fact was not reviewable on interlocutory appeal, nor was its denial of qualified immunity because there was a genuine issue of fact as to whether the criticism of the leaks to the IRS was part of Eng's job; the court stated only that Eng had clearly established rights to speak as a citizen on a matter of public concern, assuming his version of the facts to be true. App. 10, 25, 31.

As to the *Los Angeles Times* interview, the court concluded Eng had a first-person constitutional interest in his attorney's speech to the press as a "natural corollary of the long-recognized First Amendment right to hire and consult an attorney." App. 14-15. The court affirmed the denial of qualified

immunity because it concluded this case merely called for the application of settled law to a "'new factual permutation,'" and petitioners were sufficiently on notice the government could not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf. App. 33.

On March 26, 2009, the court denied the petition for rehearing and for rehearing en banc. App. 54.

REASONS TO GRANT THE PETITION

In *Garcetti v. Ceballos*, the court held that when public employees speak as part of their official duties, the speech is not subject to First Amendment protection. 547 U.S. at 421. Because it was undisputed in *Garcetti* that the public employee's speech was part of his job, the court declined to articulate specific standards for determining when an employee's speech falls within his or her official duties, noting only that the inquiry was a "practical one." 547 U.S. at 424. Three years after *Garcetti*, federal appellate courts are divided on the fundamental nature of the inquiry itself – whether it is a question of law for the court, or a mixed question of law and fact requiring initial submission to a trier of fact.

The Ninth Circuit, relying on its decision in *Posey*, in this case held that the issue of whether Eng spoke as a citizen or employee was a mixed question of law and fact. App. 20. Its ruling is consistent with

decisions of the Third Circuit, but in direct conflict with decisions of the First, Fifth, Tenth, Eleventh, and District of Columbia Circuits which have expressly held that the question of whether an employee spoke as a private citizen or as an employee is one of law for the courts.

It is vital that this Court address and resolve this conflict among the circuits. As reflected by the court's decision in *Garcetti*, lawsuits arising from public employee speech are significant both in number and in impact. In some circuits cases are necessarily proceeding with built-in reversible error: if the plaintiff's role as speaker – employee or citizen – is an issue of fact, then the First, Fifth, Tenth, Eleventh and District of Columbia Circuits are depriving plaintiffs of their Seventh Amendment right to a jury trial on issues of fact; conversely, if the issue is one of law for the courts – as petitioners contend here – public employers and supervisory personnel are being subjected to the prolonged and unnecessary litigation of issues that should properly be determined by a court. Indeed, as occurred in this case and others before the Ninth Circuit, defendants are being effectively stripped of the protection of qualified immunity: district courts defer to the finder of fact on the question of whether an employee spoke as part of his or her duties or as a citizen – where the only dispute between the parties is that very question, not the evidence underlying it – and the appellate courts then decline review of the purported factual conflict,

and decline to decide the issue of qualified immunity because of that purported factual conflict.

Whether the issue is one of law for the court or of fact in the first instance for a jury, it is also vital that the Court now provide the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job, so that supervisors will be able to determine whether they can lawfully discipline an employee for speech.

As to a client's First Amendment interest in his or her attorney's speech, the Ninth Circuit has announced a broad rule with the potential for undermining *Garcetti*. Based on the First Amendment right to retain counsel to be one's advocate in court, the Ninth Circuit held that a public employee has a personal First Amendment interest in what his or her attorney says to the press, and denied qualified immunity on the basis of "common sense." App. 14, 17, 33. Under the Ninth Circuit's rule, a statement which may be unprotected because it falls within the scope of an employee's job responsibilities, when transmitted through an attorney to the press, becomes protected, because advocacy is not limited to the courtroom. *See* App. 15 n.3. Review should be granted to reject the Ninth Circuit's substitution of a common sense standard for qualified immunity for the "clearly established law" standard and to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly.

I. THERE IS AN URGENT NEED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS ABOUT WHETHER THE DETERMINATION OF WHETHER A PUBLIC EMPLOYEE'S SPEECH WAS PURSUANT TO JOB DUTIES IS A QUESTION OF LAW FOR THE COURTS OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A JURY.

A. Under *Garcetti*, Employee Speech That Is Part Of The Job Is Not Protected By The First Amendment.

In *Garcetti,* the court held that a deputy district attorney who had purportedly been subjected to adverse employment action because of a memorandum he had written as part of his basic job duties could not assert a claim under the First Amendment. 547 U.S. at 420-23. As the court observed:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. [Citation.] That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not

insulate their communications from employer discipline. *Id.* at 421.

As the court emphasized, "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of government operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.* at 423.

In *Garcetti*, the parties did not dispute that Ceballos wrote his memo pursuant to employment duties, so the court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. Instead, the court simply stated that the "proper inquiry is a practical one." *Id.*

Practical it may be, but whether that means the inquiry is a question of law or a mixed question of law and fact is disputed among the circuits. The court's intervention to resolve this fundamental issue is urgently needed.

B. The Circuits Disagree On Whether The *Garcetti* Inquiry Presents A Mixed Question Of Fact And Law, Or A Question Of Law For The Court.

Under this Court's employee-speech jurisprudence, the threshold issue for a First Amendment claim is whether the particular speech is protected. Before *Garcetti*, the answer turned on whether the employee spoke on an issue of public concern, and if so, whether the interest of the employee, as a citizen

commenting on matters of public concern, outweighed the interest of the government, as employer, in promoting the efficiencies of its operations. *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983); *Pickering v. Board of Ed. Of Township High School Dist. 205*, 391 U.S. 563, 568 (1968). As this Court made plain, "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7.

But the Ninth Circuit, followed by the Third Circuit, has concluded that *Garcetti* altered the nature of the inquiry into the protected status of speech by requiring an additional determination of whether or not the speech at issue was part of the employee's job; this issue, it concluded, presents a question of fact that must go to the jury, postponing the resolution of whether speech is protected until the end of the district court litigation. In so concluding, it has set up a conflict with the majority of circuits which have addressed the issue post-*Garcetti*.

1. The Ninth and Third Circuits hold that the *Garcetti* inquiry is a mixed question of fact and law, requiring any dispute about the scope of employment to be first resolved by a jury.

In *Posey v. Lake Pend Oreille School District No. 84*, the Ninth Circuit reversed summary judgment against a school "security specialist" who asserted his First Amendment rights had been violated when school officials allegedly retaliated against him after

he wrote a letter to them complaining about inadequate school security. 546 F.3d at 1124. The court acknowledged that an employee must establish that he or she engaged in constitutionally protected speech, as a threshold requirement in any First Amendment claim. *Id.* at 1126. This, in turn, required a determination of whether the speech at issue touched upon a matter of public concern, and if so, whether the interest of the employee, as a citizen, in commenting upon the matters of public concern, outweighed the interest of the government employer. *Id.* Citing *Connick*, the court acknowledged that this two-stage inquiry into the "'protected status of speech is one of law, not fact.'" *Id.*

The court concluded, however, that *Garcetti* had added a "third stage" to the initial determination whether speech was protected under the First Amendment, "requiring a determination whether the plaintiff spoke as a public employee or instead a private citizen." *Id.* The court explained that while in *Garcetti* there had been no dispute that the memorandum at issue had been written in execution of the employee's official duties, in the case before it, there was a factual dispute as to the scope of the plaintiff's duties with respect to student safety. *Id.* at 1127. In light of the factual dispute, the court reversed summary judgment, concluding that the inquiry into the protected status of speech was no longer "one purely of law as stated in *Connick*," but rather, "*Garcetti* has transformed it into a mixed question of fact and law." *Id.* at 1123, 1127, 1129.

The Ninth Circuit has since expressly reaffirmed *Posey* in two published decisions. As noted, in this case the court declined to address the issue of qualified immunity based upon the purported existence of a factual dispute concerning the scope of Eng's duties. In *Robinson v. York*, No. 07-56312, 2009 WL 1109534 (9th Cir. Apr. 27, 2009) (petition for certiorari pending, 08-1462), the court similarly rejected inquiry into qualified immunity based upon the existence of an alleged factual dispute as to the scope of duties.[1]

The *Posey* court observed that its conclusion that the *Garcetti* issue involved a mixed question of law and fact was consistent with the Third Circuit's resolution of the issue. *See Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), and *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008) ("'whether a particular instance of speech is made within a particular plaintiff's job duties is a mixed question of fact and law'"); *but see Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009) (whether speech is protected is a question of law, whether protected

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[1] The Ninth Circuit also applied *Posey* in reversing summary judgment in favor of a public entity and various police department supervisory personnel in the unpublished decision, *Densmore v. City of Maywood, et al.*, No. 07-5670, 2008 WL 5077582 (9th Cir. Nov. 24, 2008) (petition for certiorari pending, 08-1082). The court held there was an issue of fact as to the scope of a probationary officer's duties to report misconduct by fellow officers.

speech was a substantial factor in alleged retaliatory action is a question of fact).

The *Posey* court also asserted its decision was consistent with case law in the Seventh and Eighth Circuits, but review of the cited decisions belies that characterization. The Eighth Circuit has not expressly held that the *Garcetti* inquiry involves a mixed question of fact and law; the two Eighth Circuit cases cited by *Posey* pre-date *Garcetti*. *See Posey*, 546 F.3d at 1128 (citing *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993); *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993)). The Seventh Circuit affirmed summary judgment based on *Garcetti* in *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008). The plaintiff had argued a jury should decide whether she acted in accordance with her official duties and the court commented that "no rational trier of fact could find" for her on the issue. *Id.* at 653. However, in addressing the plaintiff's contention that authoring the communication at issue was not part of her official duties, the court expressly cited *Connick* and reiterated that "'[t]he inquiry into the protected status of speech is one of law, not of fact.' [Citation.] Raising a First Amendment claim, without more, does not guarantee that a jury is necessary." *Id.*; *see also Bryant v. Gardner*, 587 F. Supp. 2d 951, 962 (N.D.Ill. 2008) (citing *Davis* for the proposition that the status of speech is a question of law).

2. The First, Fifth, Tenth, Eleventh, and District of Columbia Circuits hold that the *Garcetti* inquiry is a question of law for the court.

The Ninth Circuit acknowledged in *Posey* that at least three circuits have taken an opposing view on the *Garcetti* question to hold that the issue of whether an employee spoke as an employee or as a citizen is a question of law for the court. 546 F.3d at 1127-28. The Ninth Circuit understated the conflict. At least five circuits – the First, Fifth, Tenth, Eleventh and District of Columbia Circuits (and possibly six, if the Seventh Circuit is included) – have all found the issue to be one of law.

In *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), citing *Garcetti* and *Pickering*, the court found that the question of whether the plaintiff spoke as an employee or citizen was one of the threshold "'questions of law for the court to resolve. . . .'" *Id.* at 1149.

In *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), the court rejected the trial court's conclusion that whether the employee's statements were made as a citizen or an employee was an issue of fact:

> [W]e acknowledge that, even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles' speech is entitled to protection is a legal conclusion properly decided at summary judgment. *Id.* at 513 n.17.

In *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), the court construed *Garcetti* as adding a step to the "'*Pickering*' analysis of freedom of speech retaliation claims . . . [requiring] the *court* [to] determine whether the employee speaks 'pursuant to [his] official duties. . . .'" *Id.* at 1202 (emphasis added).

Both the First and Eleventh Circuits have also recognized that the *Garcetti* inquiry is one of law for the court. For example, in *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007), the court stated:

> [I]t is the judge who decides as a matter of law the issues in the two steps *Garcetti* identifies. *See Connick*, 461 U.S. at 148 n.7, 103 S.Ct. 1684 ("The inquiry into the protected status of speech is one of law, not fact."); *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003). The court must first determine whether the speech involved is entitled to any First Amendment protection – that is, whether the speech is by an employee acting as a citizen on a matter of public concern. If so, the court then decides whether the public employer "had an adequate justification. . . ." *Id.* at 45.

The Eleventh Circuit has reached a similar conclusion post-*Garcetti*. *See Boyce v. Andrews*, 510 F.3d 1333, 1343 (11th Cir. 2007) (agreeing with the Seventh Circuit that the court decides whether the plaintiff was speaking as a citizen "'or as part of her public job.'"); *Battle v. Bd. of Regents,* 468 F.3d 755, 760 (11th Cir. 2006) (per curiam) (whether the

employee spoke as a citizen on a matter of public concern is a threshold legal question); *Burton v. City of Ormond Beach, Fla.*, 301 Fed. Appx. 848, 852 (11th Cir. 2008) ("[w]hether an employee spoke as a citizen is a question of law for the court."); *Schuster v. Henry County Ga.*, 281 Fed. Appx. 868, 870 (11th Cir. 2008) ("[W]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law that the court decides.").

In sum, the appellate courts are squarely at odds concerning the fundamental issue of whether the *Garcetti* inquiry is a question of law requiring resolution by a court, or a mixed question of fact and law requiring initial determination by a finder of fact. This conflict clearly needs resolution by this Court at this time.

C. Review Is Necessary To Resolve The Circuit Conflict By Confirming That The *Garcetti* Inquiry Presents A Question Of Law And To Avoid Undermining Legitimate Claims Of Qualified Immunity.

1. The *Garcetti* inquiry requires the same type of qualitative evaluation of speech content and context and the same balancing of interests that courts perform under *Connick* and *Pickering*.

Employee-speech jurisprudence has stemmed from this Court's recognition that "[w]hen a citizen

enters government service, the citizen by necessity must accept certain limitations on his or her freedom," and at the same time from its concern that public employees by virtue of their employment not be entirely divested of First Amendment rights, but rather restricted only so far as is "necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 418-19. The nuanced balancing and line-drawing required to determine the scope of First Amendment protection under particular circumstances has wisely been assigned to courts (*Connick*, 461 U.S. at 148 n.7), leaving to juries the determination of whether, in fact, protected speech motivated the employer to act against the employee in some manner that caused the employee harm.

As noted, a majority of circuits have concluded that the *Garcetti* inquiry presents a question of law, based largely on the realization that *Garcetti* simply identified another factor to be considered during the threshold inquiry of whether a particular employee communication is subject to First Amendment protection. *See, e.g., Curran v. Cousins*, 509 F.3d at 45 (whether employee speaks as employee or citizen is a "subpart" of initial inquiry whether employee speaks as a citizen on a matter of public concern). Both implicitly and explicitly, the circuits have recognized that resolution of the issue requires courts to perform the same sort of qualitative analysis of content and context that they do in resolving whether the speech at issue is of public or private concern and whether the balancing of interests under *Pickering* favors employee or employer. For example, the Eleventh

Circuit observed in *Boyce v. Andrews*, 510 F.3d at 1343: "We initially must decide whether . . . [the employees] spoke as government employees or as citizens. Deciding whether a government employee's speech relates to his or her job . . . 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.' *Connick*, 461 U.S. at 147-148." *See also Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (reviewing the context and content of employee memo to conclude it was written pursuant to official duties); *see Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) ("the pursuant-to-official-duty inquiry ultimately cannot be completely divorced from the content of the speech" and "the analysis in . . . *Garcetti* . . . suggests that the content of an employee's speech – though not determinative – will inform the threshold inquiry of whether the speech was, in fact, made pursuant to the employee's official duties.").

In this case, the key evidentiary facts regarding context and content are undisputed. Eng was a member of the District Attorney's Task Force investigating Belmont; his specific assignment focused on potential environmental crimes while two colleagues were assigned to investigate allegations of contractor fraud. App. 57. When Eng became aware that Anthony Patchett, also on the Task Force, and an investigator planned to report to the IRS that the school district had committed fraud by purchasing the Belmont property with Certificates of

Participation and would lose its tax-exempt status, Eng performed legal research and warned against such disclosure, having concluded Certificates of Participation were legal and disclosure could expose the District Attorney's office to liability for any damages incurred by the school district as a result of the IRS investigation. App. 58-59. Subsequently, at the executive staff meeting regarding the Task Force investigation, Eng was highly critical of the disclosure to the IRS. App. 59. Eng implicitly acknowledged that members of the Task Force were not prohibited from working on, assisting in, or commenting on any aspect of the investigation, but he contended that he was not "duty-bound" to speak out on the disclosure to the IRS because that involved a matter outside of his specific assignment. His bare assertion, according to the district court and the Ninth Circuit, creates an issue of fact for the jury.

Implicit in Eng's argument, and the assumption that his assertion that he was not duty-bound to criticize the leak to the IRS presents an issue of fact, is the notion that however much the criticism or advice of an attorney employed by a public entity may advance the public entity's interest by preventing or remediating a legal misstep by the team on which he serves, that advice and criticism cannot be deemed part of his professional responsibilities, unless he was specifically assigned to give it. Or at least a jury gets to make that call.

Because the inquiry as to the scope of employment responsibilities is so intimately tied to

the same sort of analysis and evaluation of content and context of employee speech that a court performs in making a legal determination under *Connick* and *Pickering*, this Court should grant review to reaffirm the legal nature of this inquiry.

2. Determining that the *Garcetti* inquiry presents a mixed question of fact and law undermines legitimate claims of qualified immunity in the First Amendment context.

This Court has repeatedly emphasized that qualified immunity is a defense not simply to the underlying claim but to involvement in the litigation at all, and should therefore be raised and determined at the earliest opportunity. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."); *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (qualified immunity determination "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

By holding here, as in other cases, that an issue of fact as to whether a statement is protected arises upon an employee's bare assertion that a given statement fell outside his or her job responsibility, the Ninth Circuit has essentially foreclosed qualified immunity for public officials and supervisors in this

context. Faced with disagreement between the parties as to whether the statement falls within the employee's job duties, the district court requires the question to be put to the jury, even though the underlying evidence is not disputed. Defendants who claim that at least they are entitled to qualified immunity then assert their right to interlocutory appeal but are effectively deprived of appellate review because, as the Ninth Circuit held here, it cannot review such factual disputes. App. 10; *see Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995). Even though on a mixed question of fact and law, a court has the final say, belated review after the jury has returned a verdict is too little too late to meaningfully protect the important interest that qualified immunity is designed to advance.

The mischief caused by mischaracterizing a question of law as one of fact, and hence insulating the denial of qualified immunity from review is evident in this case. Petitioners contend they were entitled to summary judgment on the claim based on Eng's criticisms of the IRS leak, because there was no First Amendment violation in the first instance under *Garcetti*. At the least, even assuming a violation, there was no clearly established law that would have put them on notice that Eng's statements did not constitute employee speech under *Garcetti*. This Court has recognized that where the requirements of the law are at least debatable, officials deserve the benefit of the doubt. "[Qualified immunity] provides ample protection to all but the plainly incompetent or

those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree [about whether specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

Surely a reasonable supervisor would *not* understand that Eng's criticisms – made to the District Attorney and his executive staff during a Task Force meeting, based on legal research he had performed within the scope of the Task Force investigation, if not within the scope of his specific assignment, and advocating remediation of conduct that might possibly expose the District Attorney's Office to liability – were being made as a citizen rather than as an employee. Given the undisputed facts of what Eng said, why and where he said it, reasonable supervisors would have every reason to believe he was doing what he was paid to do, however much they may have disagreed with him. Yet, under the Ninth Circuit rule, since the question of scope of duties must go to the jury, the denial of qualified immunity is unreviewable.

Thus, absent intervention by this Court, public officials and supervisors will be subjected to needless involvement in litigation, as both trial and appellate courts, at least in the Ninth and Third Circuits, defer to the finders of fact before addressing an issue that

is a pure issue of law and that should be determined "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). For this reason too, review is warranted.

II. COURTS AND EMPLOYERS NEED THE GUIDANCE OF THIS COURT ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

The Ninth Circuit in this case commented that if Eng's statements about disclosures to the IRS are determined to fall outside the scope of his job responsibilities, then he spoke as a private citizen on a matter of public concern, and it has "long been the law of the land" that such speech is protected. App. 31. However, the court failed to address, at least explicitly, what a jury should consider to make the initial determination. More fundamentally, what factors should supervisory personnel consider in making the call as to which side of the line a particular statement falls? In *Garcetti*, the court expressly declined to provide a "comprehensive framework" for determining when a given statement cannot be viewed as employee speech. 547 U.S. at 424. Until such a framework is in place, supervisory personnel should surely be entitled to qualified immunity in the event they make the wrong call.

A. The Circuits Have Applied Varying Factors To Determine Whether A Public Employee's Speech Is Unprotected For Being Part Of The Job, But They Do Not Always Appear To Agree As To What Those Factors Should Be.

In the three years since *Garcetti*, federal courts have applied varying criteria in determining whether an employee's speech was within the employee's job-related responsibilities. The more common factors fall within several broad categories. Yet, even within these categories, as this case suggests at least implicitly, courts sometimes disagree, giving different weight to seemingly similar factors and engaging in the sort of ad hoc decision-making that provides neither consistency nor predictability in the law.

1. The person addressed.

Several courts have held that where the employee directed the speech to supervisors or others within the chain of command, the particular communication falls within the employee's official duties. *See, e.g., Haynes v. City of Circleville*, 474 F.3d at 364 ("that [the employee] communicated solely to his superior also indicates that he was speaking in '[h]is capacity as a public employee . . . '"); *see Davis v. McKinney*, 518 F.3d 304, 313, 315-16 (5th Cir. 2008) ("[W]hen a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job."). Here, Eng directed his

complaint about the leak to the IRS to his supervisors, the District Attorney and his executive staff; yet the case seems to illustrate that in the Ninth Circuit the fact that the complaint was directed to supervisors may not be relevant, much less dispositive, because a jury could presumably find in Eng's favor simply on the basis of the limited nature of Eng's particular assignment on the Task Force. *See* App. 25 ("Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS").

2. Time and place.

In *Mills v. City of Evansville,* 452 F.3d 646 (7th Cir. 2006), a police sergeant was allegedly disciplined for speaking out against the police chief's plan to reduce the number of crime prevention officers under her supervision. *Id.* at 647. Concluding she spoke "as a public employee contributing to the formation and execution of official policy," the court found dispositive the facts that she "was on duty, in uniform, and engaged in discussion with her supervisors" on department premises, having just emerged from the meeting where the plans were announced. *Id.* at 648.

In contrast, in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, the Tenth Circuit found that charter school teachers who participated in off-campus, after-hours meetings where they discussed a wide array of concerns about the school's

operation were speaking as citizens, in part because of the time and place of these discussions. *Id.* at 1205.

On the basis of time and place factors, this case is substantially more aligned with *Mills* than with *Brammer-Hoelter* insofar as Eng's comments took place in a meeting of his superiors to discuss the Task Force investigation, yet it is implicit in the Ninth Circuit's opinion that time and place factors can be ignored.

3. Specialized knowledge and access to information.

Several courts have held that an employee's speech is made pursuant to official duties where, as in this case, that speech addresses or is based on special knowledge, experience, or facts acquired in the course of performing the employee's job.

For example, in *Williams v. Independent School Dist.*, 480 F.3d 689 (5th Cir. 2007), a high school athletic director and football coach alleged that he was improperly fired for two memos expressing concern about possible mismanagement of gate receipts and other athletic funds. *Id.* at 690-91. The Fifth Circuit held the memos were made pursuant to the employee's job duties because the suspicions detailed in them were based upon special knowledge about the amount of funds that should have been in the school's athletic funds and standard operating procedures for athletic departments. *Id.* at 694.

The Third Circuit employed a similar analysis in *Gorum v. Sessoms*, 561 F.3d 179, where the court held that a professor's actions in advising and advocating for a student in disciplinary proceedings fell within his professional duties; the professor's position as department chair and his "special knowledge of, and experience with, the DSU disciplinary code" put him in the position of de facto advisor to DSU students facing disciplinary proceedings. *Id.* at 186.

Yet, as the present case indicates, for some federal courts the source and nature of the employee's knowledge may be irrelevant. Eng's complaint about the leak to the IRS was derived from his position on the Task Force, his special access to the work of and discussions with his colleagues, and his own legal research. His complaints at the meeting of the District Attorney's executive staff reflect this specialized job-related expertise and access. Nonetheless, this case suggests these factors could presumably be ignored in favor of the single factor of Eng's specific assignment within the Task Force, even though an employee's official job description is not dispositive. *Garcetti*, 547 U.S. at 424-25.

4. Regulation, policy, or statute requiring employee's speech.

Courts have also considered whether particular internal regulations and policies, or even statutes of state or nation-wide application require an employee in the plaintiff's position to speak, and so make the

speech part of his or her job. *See, e.g.*, *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (police officer's report to district attorney regarding illegal acts of police chief was part of the duties of a law enforcement officer and pursuant to department policy); *see Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323, 1330 (10th Cir. 2007) (reporting misconduct to federal Head Start officials was not protected because it was "pursuant to, or in compliance with, certain federal regulations" governing Head Start); *see Battle v. Bd. of Regents*, 468 F.3d at 761-62 (report of financial aid officer about fraudulent handling of federal financial aid funds was within the scope of duties because report was required by federal Department of Education guidelines.).

In contrast, the Seventh Circuit found reporting requirements similar to those at issue in *Casey* and *Battle* to be insufficient to establish job-related responsibilities under *Garcetti*. In *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) and *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) the provision at issue was an Illinois statute that required state employees to report to the state's Attorney General suspicions of anticompetitive practices in procurement decisions. In both cases the Seventh Circuit held that the statute did not create responsibilities specific enough to the employee's actual job functions to make reports pursuant to the statute fall within the scope of the employee's duties for purposes of the First Amendment analysis under

Garcetti. *See Trigillo*, 547 F.3d at 829; *Chaklos*, 560 F.3d at 712.

These decisions regarding reporting requirements underscore the wider problem created by the divergent approaches federal courts are free to take in addressing the scope-of-duties issue: current case law provides little or no guidance for predicting the outcome with any certainty in any particular case.

B. Review Is Necessary To Provide A Framework For The *Garcetti* Inquiry Which Will Guide Public Employers And Supervisors In Determining Whether They May Discipline An Employee For His Or Her Speech Without Violating The First Amendment.

Whether the *Garcetti* inquiry is one of law for the court or a mixed question of fact and law, the need for clarification and a uniform approach in making the determination is manifest. For example, if the Ninth Circuit is correct that the jury makes the initial determination regarding scope of employment, how is it to be instructed? What factors may it consider? This information is equally essential to supervisors who must determine whether they can lawfully discipline an employee for speech. On the other hand, if the *Garcetti* inquiry is one of law for the courts, without clear standards, courts are free to pick and choose among various criteria, or even invent their own, and so it is difficult to predict how any

particular court will resolve the issue in any given case.

In this case, both the district and appellate courts have temporarily avoided the issue of what factors should be considered, and how much weight should be given them, by deferring the scope-of-duties analysis to a future trial. Meanwhile, the absence of clear guidelines from this Court directly impacts the day-to-day decision-making of public employers and supervisors. The uncertain prospect of litigation can only hamper the effective operation of the government agency in its attempt to provide necessary public services.

III. REVIEW IS NECESSARY TO DETERMINE THE SCOPE OF THE FIRST AMENDMENT INTEREST A PUBLIC EMPLOYEE MAY HAVE IN AN INTERVIEW GIVEN BY HIS OR HER ATTORNEY TO THE PRESS.

Eng alleges that petitioners retaliated against him for what his attorney said during an interview with the *Los Angeles Times*. The attorney had referenced, among other things, Eng's conclusion that no environmental crimes had been committed and his criticism of conduct that had sparked an IRS investigation. App. 61. Neither the parties below, nor two district judges perceived that discipline on the basis of an attorney's statements to the press might violate the client's free speech rights; rather all assumed that any violation that occurred was of the

attorney's right to free speech, and that the only question was whether Eng had third-party standing to assert that right. *See* App. 49-50. The district court concluded he did, and petitioners unsuccessfully contended they were entitled to qualified immunity because the law was not clearly established on that point.

In affirming the denial of qualified immunity, the Ninth Circuit altered the analysis to hold that Eng had a direct personal First Amendment interest in his attorney's comments to the press. App. 14. The court acknowledged that it had not previously addressed the issue of a client's First Amendment interest in his or her attorney's statements to the press, nor did it cite to decisions on the subject in other circuits. App. 33. Instead, on the basis of cases that recognized a First Amendment interest in the right to retain counsel and that held an attorney's free speech interest when advocating on behalf of a client in the courtroom was grounded on the free speech rights of the client, it concluded that "this case involved 'mere application of settled law to a new factual permutation.'" App. 14-15, 33. Thus, petitioners were "on notice of the common sense conclusion that the government may not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf." App. 33. The underlying notion is one of broad-based advocacy: "[W]e see no reason to limit recognition of a client's constitutional interest in an attorney's representation to in-court speech only. There can be little doubt that zealous

representation extends far beyond the confines of brief-writing, examination of witnesses, and oral argument." App. 15 n.3.

However, it takes a leap to span the distance between a protected interest in the right to retain an attorney and to an attorney's representation in court, on the one hand (the First Amendment rights of association and to petition for redress), and on the other, a protected interest in whatever the attorney says, regardless of content or context.

Moreover, the Ninth Circuit has couched this rule so broadly that employee statements that might not otherwise be protected become protected merely by virtue of having been reported to the press by the employee's attorney. Here, for example, the district court determined Eng's conclusion that no environmental crimes were committed was unprotected under *Garcetti* because it was part of his job; transmitted through his attorney, it becomes protected under the Ninth Circuit rule because the attorney is advocating for his client. The result would be the same with respect to Eng's critical remarks during the executive staff meeting about leaks to the IRS, assuming, as petitioners contend, they were part of his job.

Indeed, statements that may not qualify as matters of public concern or that were made in a context where the *Pickering* balance would weigh in favor of the government employer, if transmitted

through an attorney, become protected as a "natural corollary" of the right to retain counsel. App. 15.

Qualified immunity shields a government official from liability for action which may result in a unconstitutional deprivation of rights, so long as the official, at the time the action was taken, would not reasonably know that it violated the employee's "clearly established" constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The law is not clearly established here, and the Ninth Circuit's "common sense" standard should not be imposed as a substitute. Review is necessary to clarify the law in this area, and to establish that employee speech otherwise unprotected by the First Amendment does not necessarily become protected simply by virtue of having been transmitted to the press by the employee's attorney.

CONCLUSION

For the foregoing reasons, petitioners urge that the petition be granted.

DATED: June 19, 2009

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ENG,

Plaintiff-Appellee,

v.

STEVE COOLEY, District Attorney; STEVEN SOWDERS, Head Deputy District Attorney; CURT LIVESAY, former Chief Deputy District Attorney; ANTHONY PATCHETT, former Special Assistant to the District Attorney; and CURTIS A. HAZELL, Assistant District Attorney; in their individual capacities,

Defendants-Appellants.

No. 07-56055

D.C. No. CV-05-02686-ODW

OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright, II, District Judge, Presiding

Argued and Submitted
November 20, 2008 – Pasadena, California

Filed January 14, 2009

Before: Richard D. Cudahy,* Harry Pregerson, and Michael Daly Hawkins, Circuit Judges.

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

COUNSEL

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OPINION

HAWKINS, Circuit Judge:

We must determine whether Steve Cooley, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell (collectively, the "Defendants") are entitled in their individual capacities to qualified immunity in this § 1983 First Amendment retaliation case.[1] Resolving this question involves, in part, David Eng's

[1] Eng's complaint also identifies as defendants the County of Los Angeles and the named defendants in their official capacities. Qualified immunity is not available, however, to municipalities or individuals in their official capacities. *See, e.g., Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1993) ("A municipality (and its employees sued in their official capacities) may not assert a qualified immunity defense to liability under Section 1983." (citing *Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985))). We therefore consider only the individual defendants in their individual capacities in this interlocutory appeal.

claim that he was retaliated against by the Defendants for an interview given by his lawyer on his behalf to the press. Concluding that we lack jurisdiction to address whether Eng has third party standing to vindicate the constitutional rights of his lawyer, but that he may nevertheless claim a personal First Amendment interest in his lawyer's advocacy on his behalf, we affirm the district court's partial denial of qualified immunity.

I. FACTUAL AND PROCEDURAL BACKGROUND

"Assuming that [Eng]'s version of the material facts is correct, as we must in the context of an interlocutory appeal of a qualified immunity decision," *CarePartners, LLC v. Lashway*, 545 F.3d 867, 878 (9th Cir. 2008), the record establishes the following.

A. Factual Background

Eng, a Los Angeles County Deputy District Attorney, was assigned to the Belmont Task Force ("Task Force") to investigate allegations of fraud and environmental crimes related to the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex ("Belmont"). The Task Force was established by newly-elected District Attorney Steve Cooley, who had campaigned on a promise to reform the Belmont project. The Task Force was headed by Special Assistant Anthony Patchett, who emphasized from the beginning that

the Task Force would deliver "slam dunk" indictments against prominent individuals involved with the Belmont project.

Following an extensive seven-month investigation, the Task Force concluded that the building site was and had always been environmentally safe and that no indictments should issue. Hours before the Task Force presented its findings and recommendations to Cooley and his executive staff, Eng briefed Patchett about the report. Patchett threatened Eng with "severe [personal] consequences" if the Task Force did not say what Patchett believed Cooley "wanted to hear." Eng nevertheless presented his report recommending that no criminal charges be brought. Following Eng's discussion of the Task Force's findings, Patchett made his own presentation opposing Eng's report and distributed proposed indictments against several prominent individuals. Cooley's executive staff considered both recommendations and declined to adopt Patchett's.

In the same meeting, the Task Force also discussed a *Los Angeles Times* article reporting that the Los Angeles Unified School District's (the "School District") lease-purchase agreements used to finance the Belmont project were being canceled and that the School District would have to refinance the project at a substantially higher interest rate. According to Eng, the agreements were cancelled because Patchett had improperly leaked to the IRS that the School District had committed fraud in purchasing the Belmont property. Eng argued that

the lease-purchase agreements had been legal and that Patchett's contrary report to the IRS was "wrong and should be rectified." Cooley, who had become angry with Eng, told him to "shut up."

Over the next several months, Cooley and members of his staff met frequently to discuss "a method of forcing David Eng out of the District Attorney's Office." First, a few months after the presentation, John Zajeck (who replaced Patchett as head of the Task Force) informed Eng that he was under investigation for sexual harassment of a Task Force law clerk with whom Eng had previously engaged in a consensual "private relationship." The relationship was not unusual and was not in violation of any office policy.

Patchett and Zajeck had approached the law clerk earlier to inquire about the relationship. She told the pair that Eng had not sexually harassed her, nor had she told anyone he had. After learning that Zajeck had initiated a sexual harassment investigation against Eng, moreover, she expressly advised the department that Eng had not sexually harassed her. The investigation nevertheless proceeded without the law clerk's knowledge or participation. Eng was told to work from home until further notice and not permitted to return to work until the following month.

Next, in what Eng asserts was a "clear demotion," Cooley reassigned him to the Pomona Juvenile Division, even though Eng was a senior attorney in the office, and the Juvenile Division is "considered to

be the first stop for beginning attorneys." (Eng had served in the Juvenile Division in the mid-1980s.) Eng was also interviewed by three District Attorney investigators regarding the alleged sexual harassment charge. During the interview, the investigators falsely claimed that the law clerk had not disavowed the alleged harassment. No harassment charges were ever brought against Eng.

About five months later, Eng was suspended with pay and instructed not to return to work without further notice, at which time he retained attorney Mark Geragos. Eng was subsequently served with a Notice of Intent to Suspend, which stated that misdemeanor charges had been filed against him for using an office computer to access private information. Head Deputy Steven Sowders subsequently informed Eng that he was being suspended without pay. Eng and Geragos argued that, because the allegations were baseless, his suspension should be with pay. That request was denied. Sowders terminated Eng's pay and benefits and also refused to allow him to "cash out" his vacation time, as was ordinarily allowed.

When the misdemeanor charges against Eng went to trial some two months later, they were dismissed when the only potential witness against Eng invoked his Fifth Amendment right to remain silent, evidently having misused office computers himself. Sowders still refused to allow Eng to return to work. Eng and Geragos appealed to the County Civil Service Commission, which ordered that Eng be allowed

to return to work and that his lost pay and benefits be restored. Sowders refused to follow the order and extended Eng's suspension without pay for an additional thirty days.

Around the same time, the *Los Angeles Times* published a prominent article on Eng's case, titled "D.A. Accused of Payback Prosecution." The article, which included an interview with Geragos, detailed Eng's allegations that he had been prosecuted because he refused to file criminal charges against individuals involved in the Belmont School project, and because he complained that it was improper for members of the Task Force to contact the IRS.

Shortly after the article went to press, Sowders informed Eng and Geragos that Eng would "never be allowed to come back" to the District Attorney's Office and that "they would come up with additional things to charge Eng with so that he would remain on suspension or be terminated." Ironically, the day after the article was published, the District Attorney's office released the final Belmont Report, which mirrored the conclusions originally presented by Eng.

Two weeks after the *Los Angeles Times* article appeared, Sowders met with Eng and served him with a second Notice of Intent to Suspend, realleging the same facts as in the original notice and recounting additional allegations "stemm[ing] from acts which purportedly occurred years prior." During the meeting, Sowders asked Eng why he had allowed Geragos to give an interview to the *Los Angeles*

Times. In a subsequent meeting among Eng, Geragos, Sowders, and Chief Deputy District Attorney Curt Livesay, Sowders offered to "resolve matters" if Eng agreed to "tell the *Los Angeles Times* that Geragos's comments were unauthorized and inaccurate, and if he would publicly apologize to Cooley."

Without agreeing to the retraction, Eng returned to work one week later at the Padrinos Juvenile Court. The following week, however, the District Attorney's office issued a second Notice of Suspension without Pay, evidently again ignoring the Civil Service Commission's order and the dismissal of the criminal charges against Eng. In a second hearing before the Civil Service Commission, the Commission resolved all outstanding allegations in Eng's favor, including the sexual harassment charges. Eng later returned to work once again but discovered that he was not receiving full benefits. He has since been passed over for promotion.

B. Procedural Background

Eng filed suit under 42 U.S.C. § 1983 asserting, in addition to a range of state law claims, that the Defendants had retaliated against him for exercising his First Amendment right to comment on the Belmont School Project and the leaks to the IRS, and to speak through his attorney to the press, in violation of the First and Fourteenth Amendments.

Following discovery, the Defendants moved for summary judgment, asserting in part qualified

immunity from suit. The district court granted summary judgment with respect to Eng's recommendation that no criminal charges be filed against individuals associated with the Belmont project. According to the court, "Eng was merely fulfilling his job duties when he gave his Task Force recommendation," and therefore those statements were "not protected under the First Amendment."

The district court denied the remainder of the Defendants' motion for summary judgment. The court first addressed whether Eng had asserted a constitutional right. With respect to his comments about the leaks to the IRS, it concluded that "there is a genuine factual dispute between the parties as to whether this statement by Eng was made as part of his Task Force duties or as a private citizen speaking on a matter of public concern." With respect to Eng's attorney's interview with the *Los Angeles Times,* the district court concluded that "[t]he attorney made the statements on Eng's behalf, in his role as counsel. Consequently, the two have a sufficiently close relationship that Eng will be able effectively to assert his attorney's rights."

Having "established that Eng has legitimate First Amendment claims with regard to his protected speech," the district court concluded that "First Amendment protection is a clearly established constitutional right" and the Defendants therefore were not immune from liability. The Defendants appeal.

II. JURISDICTION AND STANDARD OF REVIEW

We have interlocutory appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the partial denial of qualified immunity in this 42 U.S.C. § 1983 action. *See Mitchell v. Forsyth,* 472 U.S. 511, 524 (1985).

The district court granted qualified immunity with respect to certain of Eng's statements, which it determined were constitutionally unprotected. Generally, "a challenge to the *grant* of qualified immunity [is] not independently interlocutorily appealable." *Krug v. Lutz,* 329 F.3d 692, 694 (9th Cir. 2003) (emphasis added). Although we may take pendant jurisdiction to review a grant of qualified immunity on interlocutory appeal if it is "inextricably entwined" with a denial of qualified immunity, *Watkins v. City of Oakland,* 145 F.3d 1087, 1091 (9th Cir. 1998), this is not such a case, nor does Eng argue it is. We therefore lack jurisdiction to review the district court's partial *grant* of qualified immunity and will consider only those statements with respect to which the district court *denied* qualified immunity.

Our interlocutory jurisdiction to review a denial of qualified immunity is limited exclusively to questions of law, which we review de novo. *Lee v. Gregory,* 363 F.3d 931, 932 (9th Cir. 2004). A district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal. *Id.* (citing

Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1291 (9th Cir. 1999)). "Where disputed facts exist, we assume that the version of the material facts asserted by [the] Plaintiff[ ], as the non-moving party, is correct." *KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir. 2008). We must therefore limit our review to whether the Defendants would be entitled to qualified immunity as a matter of law assuming all factual disputes were resolved in Eng's favor.

III. DISCUSSION

The qualified immunity inquiry involves two sequential questions: (1) "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [official's] conduct violated a constitutional right?" and (2) "if a violation could be made out on a favorable view of the parties' submissions, . . . [was] the right . . . clearly established . . . in light of the specific context of the case[?]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). We address each question in turn.

A. Whether Eng Alleged a Violation of a Constitutional Right

1. Whether Eng May Assert a Claim for his Attorney's Speech

Before addressing whether Eng has demonstrated that the Defendants violated his constitutional rights, we must first decide as a threshold

matter whether he has a first person interest, or third-party standing to vindicate Geragos's interest, in Geragos's interview with the *Los Angeles Times*.

Both the parties and the district court frame this question as one of third-party standing. The Defendants argue that Eng cannot pursue a "vicarious" First Amendment retaliation claim for statements made by Geragos because Eng has not demonstrated that Geragos was hindered from protecting his own interests. Eng counters that because Geragos was not himself injured, his ability to protect his own First Amendment interests was indeed hindered because he has no standing to bring his own lawsuit. The district court agreed, concluding that "Eng should be granted third-party standing to assert a claim based, in part, upon the violation of his attorney's right to free speech."

We lack jurisdiction, however, to consider whether Eng may assert third-party standing to vindicate Geragos's First Amendment interests. Our interlocutory review of the denial of qualified immunity in this case is limited to the narrow question whether the allegations indicate the Defendants violated Eng's clearly established constitutional rights. The question of standing, however, is relevant only to whether Eng may ultimately *recover* for the alleged violation and is collateral to the inquiry whether the violation has been sufficiently plead. *See, e.g., Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2769 (2008) (standing is relevant only to "whether the party invoking jurisdiction had the

requisite stake in the outcome when the suit was filed," not to the merits of the underlying claim). Qualified immunity, the Supreme Court has explained, "focuses on *the objective legal reasonableness of an official's acts*," *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added), and not on whether the plaintiff may or may not recover for the alleged illegalities.

We therefore agree with the Seventh Circuit that "the appropriate focus in a qualified immunity analysis is the legality of the conduct of the public official, not . . . his liability to the ultimate plaintiff." *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 499 (7th Cir. 1993). According to the policies underlying qualified immunity, "'[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate,'" regardless whether "'the person who suffers injury caused by such conduct may have a cause of action.'" *Id.* at 500 (quoting *Harlow*, 457 U.S. at 821). Whether Eng has standing to assert Geragos's own First Amendment interests is therefore not before us.[2] In

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[2] District courts may, of course, address standing when passing on Rule 12(b)(6) and 56 motions predicated on qualified immunity, but any ruling on such issues will generally be independent of the qualified immunity inquiry itself and cannot be raised on interlocutory appeal. Except in the rare circumstance that the standing decision is "inextricably intertwined" with the qualified immunity decision, *Swint v. Chambers County Com'n*, 514 U.S. 35, 50-51 (1995), we may address such matters only on appeals from final judgments. *See Will v. United States*, 389 U.S.

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any event, we do not believe Eng need raise a third-party standing claim because we hold that Geragos and Eng each have a first person constitutional interest in Geragos's speech.

It is well settled that when a lawyer speaks on behalf of a client, the lawyer's right to speak "is almost always grounded in the rights of the client, rather than any independent rights of the attorney." *Mezibov v. Allen,* 411 F.3d 712, 718, 720 (6th Cir. 2005) (citing *Zal v. Steppe,* 968 F.2d 924, 931 (9th Cir. 1992) (Trott, J., concurring)). In *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001), for example, the Supreme Court considered whether Congress could impose negative conditions on grants to legal services organizations, such as "prevent[ing] an attorney from arguing to a court that [federal welfare laws are] violative of the United States Constitution." *Id.* at 536. By its terms, the law at issue in that case prevented *attorneys* who accepted funding from the Federal Legal Services Corporation ("LSC") from speaking certain words on behalf of their clients. The Supreme Court framed the question presented, however, as whether the law "violates the First Amendment rights of LSC grantees *and their clients.*" *Id.* at 536 (emphasis added).

90, 96 (1967) ("All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court.").

In invalidating the restrictions, *Velazquez* reasoned that "an LSC-funded attorney speaks on the behalf of the client" and is the client's "speaker." *Id.* at 542. Just as the government's lawyer must "deliver the government's message," the private citizen's lawyer must deliver the private citizen's message. *Id.* *Velazquez* therefore suggests that government action seeking to limit an attorney's advocacy "on behalf of" a client implicates the client's, as well as the attorney's, First Amendment interests – the attorney is, after all, the client's speaker hired to deliver the client's message.[3]

This conclusion is a natural corollary of the long-recognized First Amendment right to hire and consult an attorney. *See, e.g., Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 611 (9th Cir. 2005) ("[W]e recognize . . . the 'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'" (quoting *Denius v. Dunlap,* 209 F.3d 944, 953 (7th Cir. 2000))); *DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney . . . implicates . . . clearly established First Amendment rights of association and free

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[3] Although both *Velazquez* and *Mezibov* addressed attorneys' representation of their clients in the courtroom, we see no reason to limit recognition of a client's constitutional interest in an attorney's representation to in-court speech only. There can be little doubt that zealous representation extends far beyond the confines of brief-writing, examination of witnesses, and oral argument. This case itself demonstrates that fact.

speech."). The Tenth Circuit has concluded, for example, "that an individual's First Amendment rights of association and free speech are violated when a police officer retaliates against her for retaining an attorney." *Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999). But the First Amendment's prohibition against state retaliation for *hiring* a lawyer would ring hollow if the state could simply retaliate for the lawyer's *advocacy* on behalf of the client instead. A client's free speech interest in an attorney's speech on the client's behalf therefore necessarily follows from the client's First Amendment right to retain counsel.

The further corollary of that interest, as *Velazquez* recognized, is that "[c]ounsel [must] be free of state control" and unfettered in the exercise of "independent judgment on behalf of the client." 531 U.S. at 542 (citing *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981)). In this case, if the state were able to retaliate freely against Eng for statements made by his lawyer on his behalf, lawyers' representation of public-employee-plaintiffs would be chilled, and the state's actions would be "insulat[ed]" from full and open "judicial challenge," thereby "distort[ing] the legal system." *Id.* at 544, 547. There can be little doubt, then, that "'[s]tate action designed to retaliate against and chill [an attorney's advocacy for his or her client] strikes at the heart of the First Amendment.'" *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citation omitted).

Here, the district court concluded that when Geragos spoke to the press about Eng's First Amendment retaliation case, Geragos "made the statements on Eng's behalf, in his role as counsel." The Defendants do not dispute this characterization. Because Geragos spoke on Eng's behalf in his capacity as Eng's lawyer, his words were Eng's words as far as the First Amendment is concerned. Eng himself therefore had a personal First Amendment interest in Geragos's speech.

2. The First Amendment Retaliation Test

Having determined that Eng had a personal constitutional interest in his own speech about the leak to the IRS and in Geragos's interview with the *Los Angeles Times*, we turn now to the question whether Eng has alleged a violation of that interest.

It is well settled that the state may not abuse its position as employer to stifle "the First Amendment rights [its employees] would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Acknowledging the limits on the state's ability to silence its employees, the Supreme Court has explained that "[t]he problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering*'s tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation.

First, the plaintiff bears the burden of showing that the speech addressed an issue of public concern. *See Connick v. Myers*, 461 U.S. 138 (1983); *Bauer v. Sampson,* 261 F.3d 775, 784 (9th Cir. 2001). "Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah County, Or.,* 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick,* 461 U.S. at 146). But "speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'"

Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). "'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" *Johnson*, 48 F.3d at 422 (quoting *Connick*, 461 U.S. at 147-48).

The public concern inquiry is purely a question of law, which we review de novo. *Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006) (citing *Hyland v. Wonder*, 972 F.2d 1129, 1134 (9th Cir. 1992)). If the speech in question does not address a matter of public concern, then the speech is unprotected, and qualified immunity should be granted.

Second, the plaintiff bears the burden of showing the speech was spoken in the capacity of a private citizen and not a public employee. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006); *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1126-27 (9th Cir. 2008). "Statements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.'" *Posey*, 546 F.3d at 1127 n.2 (some internal quotations and alterations omitted) (quoting, respectively, *Marable v. Nitchman*, 511 F.3d 924, 932-33 (9th Cir. 2007), and *Freitag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006)).

While "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," the "ultimate constitutional significance of the facts as found" is a question of law. *Id.* at 1129-30. In evaluating whether a plaintiff spoke as a private citizen, we must therefore assume the truth of the facts as alleged by the plaintiff with respect to employment responsibilities. If the allegations demonstrate an official duty to utter the speech at issue, then the speech is unprotected, and qualified immunity should be granted.

Third, the plaintiff bears the burden of showing the state "took adverse employment action . . . [and that the] speech was a 'substantial or motivating' factor in the adverse action." *Freitag,* 468 F.3d at 543 (quoting *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003)); *see also Marable,* 511 F.3d at 930, n.10 ("It is [the plaintiff]'s burden to show that his constitutionally protected speech was a motivating factor in [the state]'s adverse employment action.").

This third step is purely a question of fact. Once again, in evaluating whether the government's adverse employment action was motivated by the employee's speech, we must assume the truth of the plaintiff's allegations. If the plaintiff does not sufficiently allege that the state retaliated for the employee's exercise of First Amendment rights, there can be no recovery, and qualified immunity should be granted.

Fourth, if the plaintiff has passed the first three steps, the burden shifts to the government to show that "under the balancing test established by [*Pickering*], the [state]'s legitimate administrative interests outweigh the employee's First Amendment rights." *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004); *see also CarePartners*, 545 F.3d at 880. This inquiry, known as the *Pickering* balancing test, asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. Its qualified restriction of ordinarily protected speech recognizes that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. *See, e.g., Rivero v. City & County of San Francisco*, 316 F.3d 857, 865-66 (9th Cir. 2002) (determining "the outcome of the *Pickering* balancing test" requires resolving underlying "question[s] of fact"); *Hyland*, 972 F.2d at 1139 ("Application of this balancing test entails" resolution of underlying "factual inquir[ies]"). Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has "adequate justification" to restrict the

employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted.

Fifth and finally, if the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." *Thomas*, 379 F.3d at 808 (quoting *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 976-77 (9th Cir. 2002)). In other words, it may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). This question relates to, but is distinct from, the plaintiff's burden to show the protected conduct was a substantial or motivating factor. It asks whether the "adverse employment action was based on protected *and* unprotected activities," and if the state "would have taken the adverse action if the proper reason alone had existed." *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996) (emphasis added).

The *Mt. Healthy* but-for causation inquiry is purely a question of fact. *Wagle v. Murray*, 560 F.2d 401, 403 (9th Cir. 1977) (per curiam) ("*Mt. Healthy* indicates the 'trier-of-fact' should determine whether the firing would have occurred without the protected conduct."); *see also Karam v. City of Burbank*, 352 F.3d 1188 (9th Cir. 2003). In evaluating whether the employee's speech was a but-for cause of the adverse

employment action, we must therefore once again assume the truth of the plaintiff's allegations. Immunity should be granted on this ground only if the state successfully alleges, without dispute by the plaintiff, that it would have made the same employment decisions even absent the questioned speech.

3. Whether Eng Passes the First Amendment Retaliation Test

Applying this five-step First Amendment retaliation test, we conclude the allegations here demonstrate that Eng's First Amendment rights were violated with respect to both Eng's comments about the leak to the IRS and Geragos's statements on Eng's behalf to the press.

a. Whether Eng's Speech Addressed Matters of Public Concern

The Defendants did not argue below and have not argued on appeal that Eng's statements did not address a matter of public concern. Accordingly, any such argument is waived. *See, e.g., Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (defendant "waived this argument by failing to raise it either in the district court or in his brief on appeal" (citing *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923 (9th Cir. 1988))).

In any event, there is little doubt that Eng's speech did address matters of public concern. "'[C]ommunication[s] on matters relating to the

functioning of government' . . . are matters of inherent public concern." *Johnson v. Multnomah County, Or.*, 48 F.3d 420, 425 (9th Cir. 1995) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion))). The leaking of information (whether true or false) about the School District's lease-purchase agreements to the IRS was therefore a matter of public concern insofar as it led to the need for additional, more expensive financing for the public school complex.

Speech that is "'relevan[t] to the public's evaluation of the performance of governmental agencies'" also addresses matters of public concern. *Freitag*, 468 F.3d at 545 (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 973-74 (9th Cir. 2003)). Here, the leaking of such statements, as well as Geragos's statements to the *Los Angeles Times* regarding the retaliatory prosecution against Eng, were certainly "'relevan[t] to the public's evaluation of the performance of'" the District Attorney's office. *Freitag*, 468 F.3d at 545 (quoting *Coszalter*, 320 F.3d at 973-74). We therefore conclude Eng's speech addressed matters of public concern.

b. Whether Eng Spoke as a Private Citizen

The Defendants expend great effort arguing that Eng's speech with respect to the IRS leak was "inextricably related to his work," and therefore that his

speech was not protected because it was uttered in his capacity as public employee. But the district court determined that there is a genuine factual dispute between the parties regarding whether Eng's speech about the IRS leaks was made as part of his Task Force duties or as a private citizen. The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on interlocutory appeal. *Lee,* 363 F.3d at 932. Once again, "[w]here disputed facts exist, . . . we can determine whether the denial of qualified immunity was appropriate [only] by assuming that the version of the material facts asserted by the non-moving party is correct." *Jeffers,* 267 F.3d at 903.

Here, there can be no doubt that Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS or to authorize Geragos to speak to the press about the retaliation being taken against him.

c. Whether the Adverse Employment Action Was Motivated By Eng's Speech

As a threshold matter, we must consider the full range of adverse employment actions alleged in the complaint. Although the Defendants correctly note that the district court determined Eng was barred by the statute of limitations from recovering for any adverse employment actions taken before January 1,

2003,[4] whether any specific acts complained of are time-barred is (like the third-party standing question) collateral to the limited, interlocutory qualified immunity inquiry. Whether a plaintiff brings an action in time to challenge certain conduct is irrelevant, that is, to the logically independent question whether the state violated the plaintiff's clearly established rights. The applicability of the statute of limitations is therefore not before us, and we will consider the full range of adverse employment actions stated in Eng's complaint.

The Defendants do not dispute that the initial investigations and first suspension were motivated by Eng's protected speech. They argue only that Eng's transfer to the juvenile division "was not motived by any subject speech" and that "any argument by [Eng] that the 2003 suspension was motivated by his attorney's statements [to the press] was unsupported by the evidence." These assertions ignore, however, that we must assume resolution of the disputed facts in Eng's favor. Eng's account of the meeting with Livesay and Sowders, for example, plainly undermines

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[4] We are skeptical that the district court was correct to apply the "discrete acts" rather than "repeated conduct" analysis to, for example, the ongoing investigations and prosecutions at issue in this case. *See Amtrak v. Morgan*, 536 U.S. 101, 110-21 (2002) (distinguishing for statute of limitations purposes between "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" and practices that "cannot be said to occur on any particular day," and instead "occur[ ] over a series of days or perhaps years").

the Defendants' contrary assertion that the systematic investigations, prosecution, suspensions, and demotion of Eng were not motivated by his speech. Eng's further accounts of Cooley's meetings with his staff to discuss "a method of forcing David Eng out of the District Attorney's Office," and Sowders's threats to both Eng and Geragos following publication of the *Los Angeles Times* article, all also indicate that Eng's speech was a "substantial or motivating" factor in the adverse employment action.

d. *Pickering* Balancing

Eng having passed the first three steps of the First Amendment retaliation test, the burdens of evidence and persuasion now shift to the Defendants to show that the balance of interests justified their adverse employment decision. But the Defendants did not argue before the district court, and do not argue before us now, that their interest in regulating Eng's speech was sufficient to outweigh Eng's free speech interest. They have therefore waived this argument. *See, e.g., Butler,* 528 F.3d at 642.

In any event, Eng's allegations show that the District Attorney lacked adequate justification for treating Eng differently from other members of the public. The Defendants have neither alleged nor offered any evidence to support a conclusion that investigating, suspending, prosecuting, or transferring Eng for his speech was "necessary for [the District Attorney's office] to operate efficiently and

effectively." *Garcetti*, 547 U.S. at 419 (citing *Connick*, 461 U.S. at 147). Rather, viewing the allegations in the light most favorable to Eng, the full range of adverse employment action appears to have been a politically-motivated effort to silence Eng, who stood to embarrass Cooley by undermining a central plank in his campaign platform. On the record before us at this stage in the case, the Defendants have not met their burden under the *Pickering* balancing test.

e. *Mt. Healthy* But-For Causation

Rather than addressing *Pickering*, the Defendants argue that they "would have reached the same [adverse employment] decision even in the absence of [Eng]'s protected conduct." *Thomas*, 379 F.3d at 808 (quoting *Ulrich*, 308 F.3d at 976-77). They assert, for example, that Eng's suspensions would have been approved regardless of his protected speech because they were in fact "due to the information gathered from three separate internal investigations involving separate and independent allegations of misconduct." This argument ignores Eng's allegations that the investigations and apparently baseless charges were *themselves* motivated by his exercise of his First Amendment rights.

The Defendants further assert that Eng's performance on a promotability review undermines a but-for connection between his speech acts and his having been passed over for promotion. But Eng alleges he received a low score on the promotion

review in part because his record contained accusations of sexual harassment and misuse of office computers – accusations *themselves* motivated by his exercise of his First Amendment rights.

Taking Eng's version of the facts as true, the Defendants have therefore not met their burden to show that Eng's protected speech was not a but-for cause of the adverse employment actions taken against him. In sum, Eng has properly alleged a violation of his constitutional rights.

B. Whether Eng's Rights Were Clearly Established

1. The Clearly-Established Standard

Passing the First Amendment retaliation test is only a plaintiff's first hurdle before defeating a motion for summary judgment on qualified immunity. In addition to showing the violation of a constitutional right, a plaintiff must also demonstrate that the constitutional rights at issue were clearly established at the time of the violation. The "clearly established" requirement "operates 'to ensure that before they are subjected to suit, [government officials] are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier*, 533 U.S. at 206). For a constitutional right to be clearly established, "its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right'" at the time of his conduct. *Id.* (citations omitted) (quoting *Anderson v. Creighton*,

483 U.S. 635, 640 (1987)). If a plaintiff's constitutional rights were not clearly established at the time of the violation, then qualified immunity should be granted.

2. Whether Eng's Rights Were Clearly Established

a. Eng's Speech about the Leak to the IRS

The Defendants did not argue before the district court, and do not argue before this court now, that Eng's rights were not clearly established with respect to any speech *not* spoken pursuant to his official employment duties. Relying on *Garcetti* (decided in 2006), the Defendants assert only that "the law was not clearly established [in 2001] as to the nature of First Amendment protection for public employee speech *expressed pursuant to official job duties.*" This observation is beside the point.

Garcetti makes clear that if Eng's comments about the leaks to the IRS *were* spoken pursuant to his official job duties, then he cannot recover regardless of the state of the law in 2001, since there is no private First Amendment interest in "speech that owes its existence to a public employee's professional responsibilities." 547 U.S. at 421, 126 S.Ct. 1951. And if the statements were *not* spoken pursuant to Eng's job duties, the Defendants do not dispute that Eng's free speech interest was clearly established.

Nor could they. *Garcetti* concluded only that "work product" that "owes its existence to [an employee]'s professional responsibilities" is *not* protected by the First Amendment. *Id.* at 422. (Regulation of such speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 422.) Prior to *Garcetti,* the Defendants therefore may have been uncertain whether the Task Force report itself was protected, but only insofar as they might reasonably have believed that it *was* protected when in fact it was *not.* There could be no confusion, however, that when Eng "comment[ed] upon matters of public concern" "as a citizen" and *not* pursuant to his job responsibilities, his speech *was* protected by the First Amendment – that rule had long been the law of the land.[5] *See, e.g., Mt. Healthy,* 429 U.S. at 284 (quoting *Pickering,* 391 U.S. at 568). Thus, assuming Eng's version of the facts to be true, he had a clearly established right to comment on the leak to the IRS.[6]

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[5] Whether it was "clear" that Eng spoke pursuant to his job duties is a question of fact and not law; the only question here is whether Eng's free speech right was "clearly established" as a matter of law, assuming his version of the facts to be true.

[6] We have previously characterized the *Pickering* balancing test as "a context-intensive, case-by-case balancing analysis," the outcome of which is rarely clear; thus "the law regarding [First Amendment retaliation] claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity." *Dible v. City of Chandler,* 515 F.3d 918, 930 (9th Cir. 2008) (quoting *Moran v. Washington,* 147 F.3d 839, 847 (9th Cir. 1998)). Because the Defendants waived the *Pickering* balancing

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b. Eng's Attorney's Speech to the Press

Geragos's and Eng's respective First Amendment interests in Geragos's speech to the press were also clearly established at the time of the alleged retaliation. The clarity of Geragos's interest in his own speech (regardless of Eng's standing to vindicate that interest) is beyond dispute.

With respect to Eng's personal interest, by 2003, the right to retain and consult an attorney "implicate[d] . . . clearly established First Amendment rights of association and free speech." *DeLoach,* 922 F.2d at 620. It was also clearly established that "an individual's First Amendment rights of association and free speech are violated when a police officer retaliates against her for retaining an attorney." *Malik,* 191 F.3d at 1315. An individual's personal First Amendment interest in his or her lawyer's speech on his or her behalf is a natural corollary of the First Amendment right to retain counsel. Any other conclusion would eviscerate that right.

Velazquez had also been decided two years prior to Geragos's interview with the *Los Angeles Times.* That decision recognized that a federal law seeking to prevent lawyers from making certain arguments on behalf of their clients implicated the client's First Amendment rights. As the Sixth Circuit later concluded, "*Velazquez* [did not] recognize a First

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argument, we need not address whether the Defendants' lack of justification to treat Eng differently was clearly established.

Amendment right personal to the attorney independent of his client," and lawyers' free speech interests when advocating on behalf of clients "[are] almost always grounded in the rights of the client, rather than any independent rights of the attorney." *Mezibov*, 411 F.3d at 720.

Although we have not previously addressed a case precisely like this one, "'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007) (quoting *Hope*, 536 U.S. at 741); *see also Hope*, 536 U.S. at 741 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."). Because this case involved "mere application of settled law to a new factual permutation," *Porter*, 496 F.3d at 1026, we conclude that Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003. *Denius*, *DeLoach*, and *Velazquez* were sufficient to put the Defendants on notice of the common sense conclusion that the government may not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf.

IV. CONCLUSION

The district court's partial denial of qualified immunity is affirmed in full.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ENG, Plaintiff, vs. COUNTY OF LOS ANGELES, et al, Defendants.	Case No. CV 05-02686 ODW (SSx) ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Jul. 11, 2007)

I. INTRODUCTION

Plaintiff David Eng filed this action on April 12, 2005 against the County of Los Angeles, six County employees (including District Attorney Steve Cooley), and Does 1-10. Eng contends that Defendants retaliated against him for exercising his First Amendment right to comment on an investigation of a municipal public-works project (the Belmont School Project) conducted by the District Attorney's Office.

On July 5, 2006, Eng filed his Second Amended Complaint, alleging three claims for relief: (1) denial of First Amendment rights under 42 U.S.C. § 1983; (2) retaliation under California Labor Code section 1102.5; and (3) intentional infliction of emotional distress.

Defendants now move for summary judgment, or alternatively, summary adjudication. Defendants filed their instant motion on March 20, 2007 along with a Separate Statement of Uncontroverted Facts

and Conclusions. On April 27, 2007, Plaintiff Eng filed an Opposition and a Response to Defendants Allegedly "Uncontroverted" Facts and Separate Statement of Genuine Issues of Material Fact in Opposition to Defendants' Motion for Summary Judgment, to which Defendants timely filed a Reply brief.

After review of the parties' submissions and the case file, as well as the arguments advanced by counsel at the hearing, the Court hereby DENIES Defendants' Motion for Summary Judgment in its entirety.

II. FACTS

In January 2001, Plaintiff David Eng, a Los Angeles County Deputy District Attorney, was assigned to investigate potential environmental crimes surrounding the planning and construction of the Belmont Learning Complex ("Belmont") as part of the Belmont Task Force ("Task Force"). (SAC ¶ 24).[1] The Task Force was set up at that time by newly elected District Attorney Steve Cooley to investigate various fraud claims against individuals involved with the Belmont project.[2] (SAC ¶ 27). Conducting an

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[1] The Court cites to Plaintiff's Second Amended Complaint ("SAC").

[2] The investigation involved the proposed construction of the Belmont Learning Complex ("Belmont"), a $200 million-plus project that was halted in 1999 when the Los Angeles Unified School District ("LAUSD") determined that the site would be

(Continued on following page)

investigation into the Belmont project had been a cornerstone of Cooley's campaign in his race against incumbent Gil Garcetti. (SAC ¶ 20). Cooley attacked Garcetti for "white-washing" the investigation into what Cooley called a "toxic Taj Majal" and announced that if he were elected, he would reopen the investigation into fraud connected with the planning and construction of Belmont. (SAC ¶ 20).

The Task Force was originally headed by Defendant Anthony Pachett [sic], a retired Deputy District Attorney who was one of Cooley's key campaign advisors and played a significant role in bringing the Belmont issue to the forefront of Cooley's campaign against Garcetti. (SAC ¶ 21). From the beginning of Eng's association with the Task Force, Patchett allegedly emphasized that Cooley had campaigned on the Belmont issue, and "it would be a 'slam dunk' . . . to indict prominent individuals from the LAUSD, contractors involved in the construction of Belmont and partners at the law firm of O'Melveny and Myers ("O'Melveny"), which had acted as counsel for LAUSD in the planning an acquisition of the Belmont site and the proposed construction of the school." (SAC ¶ 25). Patchett also expanded the Task Force to include non-lawyers and persons outside the District Attorney's Office, some of whom Eng objected to because

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unsafe for children because of toxic and explosive gasses underneath the buildings. (SAC ¶ 19).

they were not impartial and seemed biased against the subjects of the investigation. (SAC ¶ 27-30).

From January through July 2001, members of the Task Force reviewed thousands of documents, interviewed witnesses and suspects and conducted their own environmental testing of soils and ambient air at the Belmont site. (SAC ¶ 35). In March 2001, the Task Force hired Geomatirx [sic] Consultants to conduct an independent review of the documents, and a technical assessment of the soil and air samples. (SAC ¶ 36). Eng asserts that, after conducting its review, Geomatrix "concluded that there was not and never had been dangerous levels of methane or hydrogen sulfide building up at the site." (SAC ¶ 37).

On July 16, 2001, the Task Force presented its findings and recommendations to Cooley and his Executive Staff (SAC ¶ 38). Eng alleges that, hours before the meeting, he briefed Patchett on his conclusion that no criminal indictments should issue. In response, "Patchett [purportedly] threatened Eng by saying that there would be severe consequences for him personally if he did not present what Patchett wanted to hear." (SAC ¶ 40). Despite this threat, Eng allegedly gave his own assessment of potential environmental issues and discussed Geomatrix's findings. (SAC ¶ 41). Eng concluded by recommending that no criminal charges be filed for violation of environmental laws against anyone associated with the project. (SAC ¶ 41). Following Eng's presentation, Patchett made his own presentation, which purportedly opposed Eng's recommendations, where he distributed

copies of a fifty-page criminal complaint naming various individuals associated with the LAUSD, O'Melveny, and Kajima, the main contractor on the Belmont project. (SAC ¶ 42). Eng asserts that, at the end of Patchett' s presentation, the Executive Staff unanimously rejected Patchett's recommendation. (SAC ¶ 42, 46).

Also discussed at the July 16, 2001 meeting was a *Los Angeles Times* article, which reported that LAUSD Certificates of Participation ("COPs") used to finance the purchase of the Belmont property were being canceled, and that the LAUSD would have to refinance the purchase amount at a significantly higher interest rate. (SAC ¶ 43). Eng alleges that the COPs were cancelled because Patchett and another Task Force investigator leaked to the Internal Revenue Service ("IRS") that the LAUSD had committed fraud by using the COPs to purchase the Belmont property. (SAC ¶ 44). When Eng purportedly argued at the meeting that the COPs were legal, and that reporting otherwise to the IRS was wrong and should be rectified, Cooley allegedly became angry and told Eng to "shut up." (SAC ¶ 27).

From July to September 2001, Eng worked on a draft of the final Belmont School Report. (SAC ¶ 51). During this period, Cooley appointed Deputy District Attorney John Zajeck to replace Patchett as head of the Task Force; Patchett remained on the group as an observer. (SAC ¶ 51).

On December 6, 2001, Zajeck purportedly informed Eng that he was under investigation for sexual harassment based on a complaint by Adela Ploscar. (SAC ¶ 55). Ploscar had served as a law clerk for the Task Force, and she and Eng had pursued a relationship outside the office, as allegedly permitted by department policy and practice. (SAC ¶ 52-53). Eng asserts that, at no time during the interview did Ploscar state that he had sexually harassed her. (SAC ¶ 54). At some point, Ploscar allegedly went to the Employee Relations office, and advised the department that Eng had not sexually harassed her; she was then transferred to a different office. (SAC ¶ 57). Despite Ploscar's alleged retraction, however, and purportedly without her knowledge, the sexual harassment investigation continued. (SAC ¶ 61).

Eng returned to work in January 2002, and continued to draft his portion of the Belmont School Report. (SAC ¶ 58-59). Cooley and members of his Executive Staff purportedly met often to discuss the contents of the report and, Eng asserts, "a method of forcing David Eng out of the District Attorney's Office." (SAC ¶ 60). On April 1, 2002, in what he asserts was "a clear demotion," Eng was allegedly told that he had been assigned to Pomona Juvenile Division, effective April 2, 2002. (SAC ¶ 59). A few days later, on April 8, 2002, Eng was purportedly summoned to the Employee Relations office by Head Deputy Steven Sowders, and interviewed by three DA investigators regarding the sexual harassment charge. (SAC ¶ 61). During the interview, Eng allegedly

was not told either that Ploscar had disavowed the sexual harassment claim, or that she was unaware of the ongoing investigation. (SAC ¶ 62),

Approximately five months later, on September 16, 2002, Eng was suspended with pay from his position as a Deputy District Attorney, and told not to return to work until further notice. (SAC ¶ 63). Eng retained an attorney, Mark Geragos, who wrote Cooley to request a meeting to discuss the suspension; this request was purportedly ignored. (SAC ¶ 64-65). Eng then received a Notice of Intent to Suspend dated October 23, 2002, which stated that misdemeanor charges had been filed against him because he had allegedly used a DA computer to access private information. (SAC ¶ 67).

On November 27, 2002, Eng and Geragos met with Sowders and Sharon Matsumoto of the District Attorney's Office. (SAC ¶ 68). Matsumoto advised Eng that she had decided to suspend him without pay beginning December 1, 2002; both she and Sowders allegedly rejected Eng's and Geragos' request that the suspension be with pay because the criminal charges were meritless, and suggested that Eng cash out some of his unused vacation time. (SAC ¶ 68). When Eng later attempted to do this, however, Sowders purportedly denied his request. (SAC ¶ 70). Eng's suspension without pay began on December 1, 2002, and continued until May 2003; he alleges that, as a result, he defaulted on his mortgage payments, and his ex-wife was forced to seek bankruptcy protection. (SAC ¶ 71).

The criminal case against Eng went to trial on January 31, 2003; Eng alleges that the Attorney General's Office was forced to dismiss the charges after its chief and only witness, David Torres, invoked the Fifth Amendment and refused to testify. (SAC ¶ 72). Soon thereafter, Geragos telephoned Sowders to ask where Eng should report to work; Sowders purportedly responded that, notwithstanding dismissal of the criminal charges, Eng would not be permitted to return. (SAC ¶ 73). On February 5, 2003, Eng and Geragos appeared before the Civil Service Commission to appeal Eng's suspension; the Commission ordered that Eng be reinstated with pay and that his lost pay and benefits be restored. (SAC ¶ 74). Sowders purportedly objected to the Commissions order and asserted that he would withhold pay and reinstatement for an additional thirty days. (SAC ¶ 75).

On February 28, 2003, the *Los Angeles Times* published an article about Eng's trial and his retaliation claim. (SAC ¶ 76). The headline read: "Cooley Is Accused of Payback Prosecution," while the subheadline stated: "Deputy D.A. blames criminal charges against him, since dismissed, on Belmont dispute with his boss, whose office denies any such link." (SAC ¶ 77). The article detailed Eng's allegations that he had been prosecuted because he refused to file criminal charges against individuals involved in the Belmont School project, and because he asserted that it was improper for members of the Task Force to contact the IRS. (SAC ¶ 79-80).

On March 3, 2003, Cooley held a press conference to release the District Attorney's Belmont investigation Report, which reached the conclusions originally recommended by Eng. (SAC ¶ 82). At approximately this time, "Sowders [purportedly] told Geragos that Eng would never be allowed to come back to into the DA's Office under any circumstances because they would come up with additional things to charge Eng with so that he would remain on suspension or be terminated." (SAC ¶ 83). On March 13, 2003, less than two weeks after publication of the *Los Angeles Times* article, the District Attorney's Office filed a second Notice of Intent to suspend Eng. (SAC ¶ 84). This notice was based on new factual allegations, as well as the allegations contained in the first notice. (SAC ¶ 84). The next day, Sowders ordered Eng to come to his office with the Employee Relations Department without his attorney and served him with the new suspension notice. (SAC ¶ 85). Sowders allegedly demanded an explanation as to why Eng had allowed Geragos to make "those comments" to the *Los Angeles Times*. (SAC ¶ 85).

On April 2, 2003, Eng and Geragos met with Chief Deputy District Attorney Curt Livesay and Sowders. (SAC ¶ 86). Livesay and Sowders purportedly said that they were willing to resolve matters if Eng would tell the *Los Angeles Times* that Geragos's comments were unauthorized and inaccurate, and if he would publicly apologize to Cooley. (SAC ¶ 86). Later that day, they faxed a proposed settlement agreement to Geragos. (SAC ¶ 87). On

April 10, 2003, Sowders contacted Eng; he directed Eng to return to work on April 14, 2003 and to report to Curt Hazell, a top Cooley aid. (SAC ¶ 88). Sowders allegedly asked why Eng had not yet signed the settlement agreement, and Eng said that such questions should be directed to his, attorney. (SAC ¶ 88).

Eng met with Hazell on April 14, 2003, and began his new assignment at Los Padrinos Juvenile Court in Downey, California. (SAC ¶ 89). A week later, however, on April 23, 2003, the District Attorney's Office issued a second Notice of Suspension Without Pay. (SAC ¶ 90). In issuing this notice, the District Attorney's Office purportedly ignored the fact that criminal charges against Eng had been dismissed and it refused to obey the Civil Service Commission's Order. (SAC ¶ 90). The Civil Service Commission held hearings on Eng's second suspension without pay in December 2003 and January 2004. (SAC ¶ 93). It allegedly found against the District Attorney's Office on the allegations of sexual harassment and wrongful interference with police investigations of Eng's house and family, and against him on "minor, unrelated claims." (SAC ¶ 93).

In January 2005, Eng discovered that he was receiving only two times his annual salary in life insurance benefits – the level afforded newly hired deputy district attorneys – despite the fact that, prior to his suspension without pay in 2002, he had received life insurance equivalent to six times his salary. (SAC ¶ 95). Eng was denied a promotion in August 2005. (SAC ¶ 96).

III. DISCUSSION

A. Legal Standard: Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the intitial [sic] burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Sprin v. Santa*

Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must present specific evidence from which a reasonable jury could return a verdict in its favor). However, if summary judgment is not granted on the entire action, a court may render partial summary judgment on individual issues as to where there remains no genuine issue of material fact. Fed.R.Civ.P. 56(b), (d).

B. Analysis

1. Plaintiff's Violation of 42 U.S.C. § 1983 Claim

Defendants argue that the statements on which the Plaintiff bases his First Amendment claim upon are unprotected because they were expressed pursuant to his official duties. Since speech made pursuant to official duties is unprotected, Defendants argue that Plaintiff's statements cannot support a First Amendment claim under 42 U.S.C. § 1983. Plaintiff asserts, however, that the speech in question was not made pursuant to his official duties as a Deputy District Attorney and is thus protected.

It is a long-accepted rule that "a public employee ha[s] no right to object to conditions placed upon the terms of employment – including those which restrict[ ] the exercise of constitutional rights. *Garcetti v. Ceballos*, U.S. 126 S.Ct. 1951, 1957 (2006) (quoting *Connick v. Meyers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688 (1983)). However, "public employees do not surrender all of their first amendment rights by

reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* (citations omitted), Thus, to determine whether certain speech is protected by the First Amendment, it must be determined whether the speech in question was made when the individual was acting as an employee or as a private citizen, speaking on a matter of public concern. *Id.* at 1958. If it is established that the speech in question was made by, the employee acting as a private citizen, then the possibility of a First Amendment claim arises. *Id.* "The question then becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Ceballos*, 126 S.Ct. at 1958.

When determining whether particular speech was made as a citizen or an employee, the controlling factor is whether the expressions where made "pursuant to official duties." *Id.* at 1959. Conversely, the fact that an employee expresses his views inside the office, rather than publicly, is not dispositive in making this determination; employees in some cases may receive protection for expressions made at work. Nor is the fact that the speech concerns the subject matter of the employees employment dispositive in determining whether that speech is protected. *Id.* Rather, the dispositive inquiry is whether the speech in question is "part of what . . . [the employee] was employed to do." *Id.*

Here, there at least three statements that Eng contends potentially merit First Amendment protection. First, Eng alleges that he should be afforded protection for his Task Force presentation when he recommended to Cooley and the executive staff, on July 16, 2001, that there were no violations of environmental laws pertaining to the Belmont project. (SAC ¶ 41). It was at this meeting where Eng recommended that no criminal charges should be filed. (*Id.*) Eng alleges that he was then punished (retaliated against) for reporting in his Belmont project report that there were no environmental violations. There is no significant factual dispute regarding Eng's first statement. It is clear that Eng was part of the Task Force and his duties included the investigation of environmental violations of the Belmont project. Therefore, Eng was merely fulfilling his job duties when he gave his Task Force recommendation. As such, Eng's first statement is not protected under the First Amendment. Therefore, Eng cannot use this statement as part of his 42 U.S.C. § 1983 claim.

Second, Eng alleges that LAUSD's COPs were cancelled because Patchett and another Task Force investigator leaked to the IRS that the LAUSD had committed fraud by using the COPs to purchase the Belmont property. (SAC ¶ 44). But, when Eng purportedly argued at the meeting that the COPs were legal, and that reporting otherwise to the IRS was wrong and should be rectified, Cooley allegedly became angry and told Eng to "shut up." (SAC ¶ 27). Eng alleges that he was punished for telling the Task

Force that the alleged leaking of false information to the IRS should be rectified. The Court finds that there is a genuine factual dispute between the parties as to whether this statement by Eng was made as part of his Task Force duties or as a private citizen speaking on a matter of public concern. Accordingly, summary judgment cannot be granted as to the statement regarding the alleged IRS leak.

The third statement involves Eng's attorney's statement that appeared in the February 28, 2003 *Los Angeles Times* article. Judge Margaret M. Morrow discussed this statement in her Order Denying Defendants' Motion to Dismiss, issued on October 30, 2006. (*See* Judge Morrow's October 30, 2006 Order at 24-30). Judge Morrow ruled that:

> Eng should be granted third-party standing to assert a claim based in part upon the violation of his attorney's right to free speech. Eng has suffered injury in fact, as he has allegedly been subjected to retaliation because of statements made by his attorney, a fiduciary. The attorney made the statements on Eng's behalf, in his role as counsel. Consequently, the two have a sufficiently close relationship that Eng will be able effectively to assert his attorney's rights.

(Judge Morrow's October 30, 2006 Order at 29). Following Judge Morrow's reasoning, Eng's First Amendment claim pertaining to the *Los Angeles Times* newspaper article should be allowed to go

forward. Accordingly, summary judgment is not proper.

2. Qualified Immunity

Public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). If the asserted constitutional right was not clear, the officials cannot be liable.

In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001), the Supreme Court stated that in ruling on a summary judgment motion based on qualified immunity, the court must first ask: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated constitutional right?" *Id.* at 2156. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.*

Here, the Court has established that Eng has legitimate First Amendment claims with regard to his protected speech. First Amendment protection is a clearly established constitutional right. Therefore, Defendants are not immune from liability.

In addition, Defendants contend that they are immune from liability pursuant to California Governement [sic] Code section 821.6. However, only acts or omissions that are related to the institution or prosecution of judicial or administrative proceedings are immune. Cal. Gov. Code § 821.6. California courts have extended immunity under § 821.6 to actions taken in preparation for formal proceedings, such as conduct during an investigation. *See Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1209-10 (1994) ("Section 821.6 is not limited to the act of filing a criminal complaint. Instead, it also extends to actions taken in preparation for formal proceedings. Because investigation is an essential step toward the institution of formal proceedings, it is also cloaked with immunity") (internal citations omitted)); *see also Javor v. Taggart*, 98 Cal. App. 4th 795, 808 (2002) (same).

The statutory immunity issue has already been fleshed out by Judge Morrow in her Order dated June 14, 2006. It appears that the only claim advanced by Plaintiff that could give rise to a section 821.6 immunity defense is the emotion distress claim. In Judge Morrow's Order, she stated:

> To the extent Eng seeks relief for emotional distress caused by defendants' alleged wrongdoing in causing criminal charges to be filed against him, or in conducting an investigation regarding those matters, defendants are shielded from liability by § 821.6. This

> portion of plaintiff's third cause of action must therefore be dismissed with prejudice.

(Judge Morrow's June 14, 2006 Order at 46).

Judge Morrow granted leave for Plaintiff to amend his Complaint so as not to include any of the facts relating to the initiation of criminal charges filed against Eng in his claim for emotional distress. Plaintiff Eng's Second Amended Complaint conforms to Judge Morrow's Order. Therefore, this Court denies Defendants' request for summary judgment on immunity grounds as to the emotional distress claim as well as Plaintiff's two other claims.

3. Plaintiff's Cal. Labor Code section 1102.5 Claim

To prove a prima facie case of retaliation under § 1102.5, the plaintiff must show that (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link exists between the protected activity and the employer's action. *Akers v. County of San Diego*, 95 Cal.App.4th 1441, 1453 (Cal. Ct. App. 2002). Defendants argue that Plaintiff's Labor Code claim is barred because the Defendants pre-2003 actions were undertaken for legitimate, non-retaliatory reasons. However, there are plenty of disputed facts in the record to deny summary judgment as to this claim. Because Judge Morrow discussed this claim in some detail in her June 14, 2006 Order, the Court will not do a thorough analysis at

this time. (*See* Judge Morrow's June 14, 2006 Order at 46-48). Therefore, summary judgment as to Plaintiff's California Labor Code section 1102.5 Claim is denied.

IV. CONCLUSION

For the reasons discussed above, the Court finds that there are genuine issues as to material facts and that Defendants are not entitled to judgment as a matter of law. Accordingly, Defendants' motion for Summary Judgment is DENIED in its entirety.

DATED: July 13, 2007

/s/ Otis D. Wright
Hon. Otis D. Wright II
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ENG,

Plaintiff-Appellee,

v.

STEVE COOLEY, District Attorney; STEVEN SOWDERS, Head Deputy District Attorney; CURT LIVESAY, former Chief Deputy District Attorney; ANTHONY PATCHETT, former Special Assistant to the District Attorney; and CURITS A. HAZELL, Assistant District Attorney; in their individual capacities,

Defendants-Appellants.

No. 07-56055

D.C. No. CV-05-02686-ODW
Central District of California, Los Angeles

ORDER

(Filed Mar. 26, 2009)

Before: CUDAHY,* PREGERSON, and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Cudahy and Pregerson have recommended denying the petition for rehearing en banc.

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Judge Hawkins has voted to deny the en banc petition.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID ENG, an individual, Plaintiff, v. COUNTY OF LOS ANGELES; STEVE COOLEY, an individual; STEVEN SOWDERS, an individual; CURT LIVESAY, an individual; DAVID TORRES, an individual; ANTHONY PATCHETT, an individual; CURTIS HAZELL, an individual; and DOES 1 through 10, inclusive, Defendants.	Case No. CV 05-2686 ODW (SSx) **DECLARATION OF DAVID ENG IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: May 14, 2007 Hearing Time: 10:00 a.m. Judge: Hon. Otis D. Wright II Trial Date: June 26, 2007 Motion Cut-Off: May 7, 2007

* * *

10. The Belmont Task Force started working out of a converted storage room and warehouse in the Hall of Records in January 2001. The workspace in the converted warehouse was very open with no divisions or cubicles between individual desks and no offices, so that there was virtually no privacy for the members of the Task Force during their workday. The Task Force consisted of me, Patchett, and deputy District Attorneys George Castello and Fred Macksoud. Castello and Macksoud were assigned to investigate allegations of contractor fraud while I focused on potential environmental crimes. I had no other duties at that time, and was to devote myself exclusively to the Task Force.

11. My specific tasks while on the Belmont Task Force included initial research and investigation. I interviewed witnesses and potential suspects or targets. I reviewed literally tens of thousands of pages of documents relating to the Belmont project, including all of the prior reports and environmental studies, as well as all of the documents related to purchase of both parcels of property. There were approximately 1400 maps and charts which I needed to study. I had to determine if there was any further need for environmental studies on property. Although I worked with investigators, paralegals, law clerks and other attorneys on the Task Force, I did not have any supervisory role with respect to those people. Ultimately, all of this work was for one goal: to make a recommendation about whether environmental crimes

had been committed. We were an ad hoc committee, and were told by Patchett that if we had concerns they needed to go to him or to Cooley. There were no forms or formal channels for us to express disagreement or problems if we perceived any.

12. As we began, Patchett reminded us that Cooley campaigned on the issue and that it was the highest profile case in the Cooley administration. Patchett informed us that this would be the "easiest case" of our careers and that it would be a

* * *

30. At the July 16, 2001 Executive Staff meeting there were other issues presented as well. Fred Macksoud handed out copies of a LA Times article which reported that the LAUSD Certificates of Participation ("COP's") which were used to finance the purchase of the Belmont land for $91 million dollars were being cancelled and that LAUSD would have to refinance this $91 million dollars at a much higher interest rate, which would cost the LAUSD millions of dollars more each quarter. The cancellation of the Certificates was based upon information Tony Patchett and DA investigator Thomas Tomka had leaked to the IRS against the wishes of me, Macksoud and Castello. Patchett and Tomka reported to the IRS that the LAUSD had committed fraud by financing the purchase of the Belmont property with Certificates of Participation because the proposed school had included retail stores on the school campus and that there were environmental violations

on the site which were not reported to the investors of the Certificates of Participation.

31. Additionally, Patchett and Tomka reported to the IRS that the LAUSD would lose their tax exempt status if the Certificates Of Participation were in fact illegal. Macksoud, Castello and I disagreed with Patchett and Tomka's actions after having researched the law on this issue. In fact, we warned Patchett and Tomka in advance of their disclosure to the IRS that the COPs were in fact legal and that their actions could possibly expose the District Attorney's Office to liability for any damages incurred by LAUSD as a result of the IRS investigation. Nonetheless, the damage was done and the IRS launched their investigation. During the discussion of this issue at the July 16 Executive Staff meeting, I urged Cooley on two separate occasions to remedy the damage done by Patchett and Tomka by intervening in the IRS investigation. I argued that the reporting of this information to the IRS was wrongful and caused by members of the DA Office. Therefore, it was Cooley's responsibility to correct this injustice. Cooley angrily rebuked me on both occasions in front of the Executive staff to "shut up." He stated words to the effect that if the LAUSD wants to throw away their money, "it's not my problem."

32. Just over a year after starting the investigation into the COPs, the IRS validated my legal position and issued a public decision that the LAUSD

had committed no wrongdoing in the issuance of COPs in financing Belmont. This

* * *

I. February 2003 – Eng's Attorney Publicly Decries The Retaliatory Prosecution Of Eng In The Los Angeles Times

87. On February 28, 2003, the Los Angeles Times published a prominent and lengthy article about my trial and the contention that I was being retaliated against based on my attempts to keep the District Attorney's office from pursuing malicious prosecutions in the Belmont matter and the office's improper disclosures to the IRS.

88. The six-column article appeared on Page 3 of the Times' California section at the top of the page. The large headline proclaimed, "Cooley Is Accused Of Payback Prosecution." The sub-headline announced, "Deputy D.A. blames criminal charges against him, since dismissed, on Belmont dispute with his boss, whose office denies any such link." A true and correct copy of the article as attached hereto as Exhibit H.

89. The Times article began by noting that the DA's Office had not filed any charges in its two-year probe of the Belmont "fiasco," but that "it did pursue a criminal case against one of its own prosecutors who took part in the investigation of the unfinished high school project." The Times went on to note that the prosecution of Mr. Eng "has opened a window onto the contentious Belmont investigation."

90. The article discussed the fact that Cooley had relied heavily on allegations of wrongdoing in the Belmont matter during his campaign against Garcetti, that I had been adamant in my conclusions that no crimes had been committed and that the Belmont investigation by Cooley had been bogged down for more than two years with no report being issued. The article then specifically related the allegations that the bogus prosecution had been orchestrated to retaliate against me. It reflected as follows:

> "Eng's attorney, Mark Geragos, says his client was set up for a sham prosecution because Eng urged Cooley to come clean with the public on Belmont more than a year ago. . . . 'They realize that the emperor's got no clothes, and David wants them to do something about it – not only because it's costing the taxpayers a lot of money, but they've exposed a lot of people to a criminal investigation,' Geragos said. 'They take him out through one of the most contrived prosecutions I've ever seen.'"

91. The article also touched on the fact that I had warned Cooley about the improper involvement of the IRS in the investigation. The article related:

> "In July 2001, dozens of prosecutors and investigators crammed into a conference room to review the results of the Belmont probe. It was in these meetings, Geragos said, that Eng argued for a swift public exoneration because the inquiry had sparked an Internal Revenue Service probe into whether the tax-exempt bonds issued to finance Belmont were legal."

92. Popular LA Times columnist Patt Morrison also mocked Cooley in a separate column by stating that Cooley failed to deliver on his campaign promise but "coincidentally", just one business day later did bring criminal charges against his own Deputy District Attorney, me, who was in charge of the Belmont environmental investigation. A copy of her column is attached hereto as Exhibit I.

93. Just one business day later on Monday March 3, 2003, DA Cooley held a press conference and released to the media and the public the District Attorney's Belmont Investigation Report which mirrored the conclusions presented by me, Macksoud and Castello and Geomatrix Engineers nearly two years earlier, back in

* * *

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No. 08-1571

IN THE
Supreme Court of the United States

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, AND CURTIS HAZELL,
Petitioners,

v.

DAVID ENG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 2009

QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. In determining whether a public employee was speaking pursuant to his official duties, exactly how much weight should be given to facts related to "the person addressed," the "time and place" of the speech, and "specialized knowledge and access to information"?

3. Does an individual have a First Amendment interest in his attorney's speech to the press on his behalf?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by public employees "pursuant to their official duties" does not receive First Amendment protection. The Court made clear that the inquiry into the scope of an employee's job duties is a "practical one" that requires looking at "the duties an employee actually is expected to perform." *Id.* at 424-25.

Below, the court of appeals held that, in applying *Garcetti*, "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," while "the ultimate constitutional significance of the facts as found is a question of law." Pet. App. 20 (internal quotation marks and citation omitted). The court denied qualified immunity to supervisors accused of retaliating against Deputy District Attorney David Eng for his speech, explaining that the district court had found a genuine factual dispute over whether Eng's speech was made as part of his professional duties, that the district court's determination was not reviewable on interlocutory appeal, and that Eng's version of the facts plausibly indicated that he had no official duty to engage in the speech at issue. *Id.* at 25.

Petitioners seek review of this fact-bound determination, claiming a circuit split over whether the "*Garcetti* inquiry" is a question of law. But although some of the cases cited by Petitioners hold that the *ultimate question* of whether an employee was speaking as an employee or as a citizen is a question of law, none of the cases resolve underlying genuine disputes about "the scope and content of a plaintiff's job responsibilities" at summary judgment. The court below correctly held that such disputes are factual in nature, and Petitioners'

disagreement with the district court about whether the evidence presents genuine issues of material fact is not reviewable on interlocutory appeal.

Petitioners also claim that this Court should grant review to provide guidance on the factors to be considered in deciding whether an employee is speaking pursuant to his job duties, including on factors that they do not even attempt to argue are relevant here. However, Petitioners demonstrate no inconsistency between the decision below and decisions of other circuits on the factors they identify. Nor should review be granted "to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly." Pet. 9. The court below did not hold to the contrary. The decision below is correct, and the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

David Eng has been a Deputy District Attorney in Los Angeles County since 1984. In January 2001, Eng was assigned to a task force charged with determining whether crimes were committed in connection with construction of the Los Angeles Unified School District's Belmont Learning Complex. Pet. App. 36. The task force also included members of the public. Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) 783. The task force was established by then newly-elected District Attorney (D.A.) Steve Cooley, who had campaigned on a promise to reform the Belmont Project, and was headed by Anthony Patchett, one of Cooley's key campaign advisors, who informed task force members that it would be a "slam

dunk" to indict prominent people involved in the project. Pet App. 36-37.

Eng, who had spent years prosecuting environmental crimes, Ct. App. ER 779, was brought on to the task force to investigate potential violations of environmental laws in connection with the Belmont Project. Pet. App. 36, 57. After an extensive investigation, Eng concluded that no environmental crimes had been committed. Eng reported this conclusion at a meeting with the task force, D.A. Cooley, and Cooley's staff. *Id.* at 4.

At that same meeting, the task force discussed a *Los Angeles Times* article reporting that certain lease-purchase agreements used to finance the purchase of the Belmont land were being canceled and that the school district would have to refinance the project at a much higher interest rate. The agreements allegedly were being cancelled because Patchett and another investigator had informed the IRS that the school district had committed fraud in purchasing the Belmont property. Although Eng had not been directed to look at any issues concerning the propriety of bonds used to finance the Belmont construction, Eng stated his opinion at the meeting that the agreements had been legal, that the alleged reporting of the information to the IRS had been improper, and that Cooley had a responsibility to rectify the situation. Cooley became angry and told Eng to "shut up." *Id.* at 4-5.

After the meeting, Cooley and members of his staff met frequently to discuss "a method of forcing David Eng out of the District Attorney's office." *Id.* at 5. First, the office investigated Eng for allegedly improperly accessing the D.A.'s computer system, and it continued the investigation

even after another Deputy D.A stated that it was he, and not Eng, who had accessed the system. Ct. App. ER 733-35, 799-805. Then, the office investigated Eng for allegedly sexually harassing a law clerk with whom he had a brief, consensual relationship, and it continued the investigation even after the law clerk denied that she had been harassed. Pet. App. 5. Next, in what was a clear demotion for a Deputy D.A. with Eng's experience, Cooley transferred him to the Pomona Juvenile Division, where he had served much earlier in his career. *Id.* at 5-6.

In September 2002, Eng was suspended with pay and told not to return to work until further notice. He was not told the reasons for his suspension. The next month, he was informed that misdemeanor charges stemming from his alleged misuse of the D.A.'s computer system the previous year had been filed against him. He was subsequently suspended without pay or benefits. Although the charges were dismissed when the case went to trial, Eng was not allowed to return to work. *Id.* at 6. In February 2003, Eng appeared before the Civil Service Commission, which ordered that he be reinstated with pay and that his lost pay and benefits be restored. The D.A.'s office failed to comply, extending the suspension for another 30 days. *Id.* at 42.

A few weeks later, the *Los Angeles Times* published a long article about Eng's trial titled "Cooley is Accused of Payback Prosecution." *Id.* The article detailed Eng's allegations that he was the subject of retaliation and included an interview with Mark Geragos, Eng's attorney, who was quoted as saying, for example, that Eng's prosecution was "one of the most contrived prosecutions I've ever seen." Ct. App. ER 1015.

Soon after the article was published, Head Deputy Steven Sowders informed Eng and Geragos that Eng would never be allowed to come back to the D.A.'s office and that they would come up with additional things with which to charge him so that he would remain on suspension or be terminated. Pet App. 7. A few weeks later, Eng was served with a new Notice of Intent to Suspend, which realleged facts from his earlier suspension and raised new allegations based on events that had purportedly occurred years before. *Id.* Upon giving him the notice, Sowders asked Eng why he allowed Geragos to make "those comments" to the *Los Angeles Times*. *Id.* at 43. In a later meeting, Sowders and Chief Deputy D.A. Curt Livesay said they would resolve matters if Eng agreed to tell the *Los Angeles Times* that Geragos's statements were unauthorized and inaccurate and publicly apologize to Cooley. Eng refused to retract Geragos's statements. *Id.* at 43-44.

On April 14, 2003, Eng returned to work in the Juvenile Division. Within two weeks, however, the D.A.'s office served him with a new Notice of Suspension Without Pay that stated that it would run concurrently with the suspension based on the criminal charges, ignoring that the Civil Service Commission had resolved those charges and ordered him reinstated. *Id.* at 44. The Civil Service Commission held hearings on the new suspension in December and January and found in Eng's favor on the major claims, including the sexual harassment charges. *Id.* After Eng returned to work, he learned his life insurance benefits had been reduced. *Id.* In 2005, he was denied a promotion, in part because of the sexual harassment

allegations that had been resolved in his favor. *Id.* at 28-29.

B. Opinions Below

Eng brought this action against Cooley and other officials in the D.A.'s office, asserting that defendants retaliated against him for his statements about the Belmont Project and IRS reporting, and for his lawyer's statements to the *Los Angeles Times*. The defendants moved for summary judgment, arguing that the statements on which Eng's First Amendment claims were based were unprotected and that they were entitled to qualified immunity.

Quoting *Garcetti v. Ceballos*, 547 U.S. at 421, the district court explained that "to determine whether certain speech is protected by the First Amendment, it must be determined whether the speech in question was made when the individual was acting as an employee or as a private citizen," and that the controlling factor for whether speech was made as an employee was whether it was "'part of what . . . [the employee] was employed to do.'" Pet. App. 47. The Court found that it was clear that Eng's "duties included the investigation of environmental violations of the Belmont project," and that, therefore, he was "merely fulfilling his job duties" when he made his presentation to the task force recommending that no criminal charges should be filed. *Id.* at 48. Accordingly, the district court concluded that Eng's task force presentation was not protected under the First Amendment. *Id.*

However, the Court found that there was a genuine factual dispute about whether Eng's statement about how Cooley should rectify the leak to the IRS was made "as part of his Task Force duties." *Id.* at 49. In their

statements of material fact, the parties had disagreed, for example, over whether task force members were expected to share concerns with the D.A.'s office about aspects of the investigation outside of their assignment areas. Ct. App. ER 675-76. Because there was a genuine factual dispute, the district court denied summary judgment as to the statement involving the IRS leak. In addition, the Court decided that Eng had third-party standing to assert a claim based in part on the violation of Geragos's First Amendment rights. Pet. App. 49-50. Having "established that Eng has legitimate First Amendment claims with regard to his protected speech," and because "First Amendment protection is a clearly established constitutional right," the district court denied the defendants qualified immunity. *Id.* at 50.

The court of appeals affirmed. First, the court explained that interlocutory review of a denial of qualified immunity is limited to questions of law, and that a "district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal." *Id.* at 10. It then turned to whether Eng could assert a claim based on Geragos's statement, holding that it did not have jurisdiction to determine whether Eng had standing to assert a claim on Geragos's behalf, but that, in any event, it did not need to resolve that question because Eng had his own "first person constitutional interest in Geragos's speech." *Id.* at 14. The court explained that in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001), this Court reasoned that an "'attorney speaks on the behalf of the client' and is the client's 'speaker.'" App. 15. It noted that "the district court concluded that when Geragos spoke

to the press about Eng's First Amendment retaliation case, Geragos 'made the statements on Eng's behalf, in his role as counsel,'" and concluded, therefore, that "his words were Eng's words as far as the First Amendment is concerned." *Id.* at 17.

The court then addressed whether Eng had alleged a violation of his First Amendment rights. It explained that in determining whether speech was pursuant to an employee's official duties, "'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,'" while "the 'ultimate constitutional significance of the facts as found' is a question of law." *Id.* at 20 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129-30 (9th Cir. 2008)). It noted that the district court had determined that there was a genuine issue of material fact over whether Eng's speech about the IRS leak was made as part of his duties on the Belmont task force and reiterated that it did not have jurisdiction to review the "district court's determination that the parties' evidence presents genuine issues of material fact." *Id.* at 25. It explained that it had to view all facts in Eng's favor and concluded that "there can be no doubt that Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS or to authorize Geragos to speak to the press about the retaliation being taken against him." *Id.*

Finally, the court determined that it was clearly established that a public employee's speech was protected when he commented on matters of public concern that were not part of his job duties. *Id.* at 30. With regard to Geragos's speech, the court concluded that this case involved "mere application of settled law to a new factual

permutation," *id.* at 33 (citation omitted), and that "Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003." *Id.* Accordingly, the court affirmed the district court's partial denial of qualified immunity.

The defendants filed a petition for rehearing and rehearing en banc, which was denied without any member of the court of appeals requesting a vote. *Id.* at 55.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split Over Whether the Question of the Scope and Content of a Plaintiff's Job Duties Is a Question of Law or of Fact.

Petitioners' primary argument for review is that the decision below, which held that "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," App. 20 (citation omitted), conflicts with decisions in other circuits that hold that the "*Garcetti* inquiry is a question of law for the court." Pet. 16. But although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee pursuant to his job duties as a matter of law and some courts describe it as a mixed matter of law and fact, none of the cases cited by Petitioner holds that where there is a subsidiary dispute over "the scope and content of a plaintiff's job responsibilities," that dispute should be resolved by the court.

For example, Petitioners contend that the decision below is in conflict with the Fifth Circuit's decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008). In *Charles*,

however, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513 n.17. The court did not mention any material dispute over the scope and content of Charles's job responsibilities—it found that Charles was not speaking as an employee under any "conceivable job duties" he might have, *id.* at 514—and it did not address whether it would have resolved such a dispute at summary judgment if one had existed. Tellingly, when the Fifth Circuit found the plaintiff's official job duties unclear in a later case, *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), the court denied summary judgment.

Similarly, although the court in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), stated that the question whether an employee is speaking pursuant to his official duties is a question for the court, it did not indicate that there were material disputed questions over the scope of those job duties. Indeed, the court summarized cases following *Garcetti* as making "clear that speech relating to tasks within an employee's *uncontested* employment responsibilities is not protected from regulation." *Id.* at 1203 (emphasis added). Likewise, although the First Circuit stated in *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007), that "whether the speech is by an employee acting as a citizen on a matter of public concern" is a question of law, it did not indicate that there were any material disputes over the scope of the employee's job duties. And in the D.C. Circuit case on which petitioners rely, *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007), the court did not need to resolve disputes over the scope of the employee's job duties because it determined that the speech fell within the

employee's job responsibilities as she herself described them. Finally, none of the Eleventh Circuit cases cited by Petitioners resolves underlying genuine disputes over the employee's job duties as a matter of law. *See, e.g.*, *Battle v. Bd. of Regents*, 468 F.3d 755, 762 n.6 (11th Cir. 2006) (deciding that plaintiff's reports about fraud were pursuant to her employment duties where it was an "uncontroverted fact" that once plaintiff discovered fraud, "she had a clear duty to report" it).

In short, Petitioners have not demonstrated that the courts that describe the ultimate question as being a "matter of law" would resolve cases at summary judgment where there are underlying disputes about what duties an employee actually is expected to perform. And the court below agreed that, after the factual disputes about the scope and content of the employee's job duties are resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." App. 20 (citation omitted). Indeed, when there are no material disputed issues about the scope of the employee's job duties, the Ninth Circuit decides the ultimate issue of whether a plaintiff spoke as a citizen or as an employee as a matter of law. *See, e.g.*, *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 703-706 (9th Cir. 2009) (citing the decision below and affirming summary judgment because "the speech at issue was given pursuant to [the employees'] job duties"); *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (holding as a matter of law that some of plaintiff's speech was pursuant to job duties, but remanding for factual determinations about scope of job duties to determine whether other speech was pursuant to those duties). The Third Circuit, which the petition places on the Ninth

Circuit's side of the purported split, does the same. *See, e.g., Gorum v. Sessons*, 561 F.3d 179, 186 (3d Cir. 2009) (stating, in affirming summary judgment, that plaintiff's actions "came within the scope of his official duties"). There is no meaningful conflict here.

II. The Decision Below Is Correct.

1. In *Garcetti*, this Court made clear that the inquiry into the scope of an employee's professional duties is "a practical one" that focuses on "the duties an employee actually is expected to perform." 547 U.S. at 424-25. Questions about what duties a public employee actually is expected to perform involve precisely the "application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).[1]

Nonetheless, Petitioners argue that the "*Garcetti* inquiry" should be purely legal because it involves "the same sort of qualitative analysis of content and context that [courts] do in resolving whether the speech at issue is of public or private concern and whether the balancing of interests under *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] favors employee or employer." Pet. 19. Not all evaluations of "content and context" are legal questions,

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[1]Indeed, Petitioners' statement of material facts before the district court included twelve paragraphs under the heading "Plaintiff's statements . . . were expressed pursuant to his official duties as a deputy district attorney," Ct. App. ER 674-78, demonstrating that Petitioners originally recognized that the *Garcetti* inquiry has an underlying factual component.

however; juries, too, often evaluate content and context to decide issues of fact. In any event, the court below agreed with Petitioners that the "private citizen inquiry" is similar to the *Pickering* analysis, characterizing both as "legal question[s] . . . [whose] resolution often entails underlying factual disputes." Pet. App. 21.

Petitioners also claim that the decision below causes particular "mischief" in the qualified immunity context, claiming that they should have been granted summary judgment because "even assuming a violation, there was no clearly established law that would have put them on notice that Eng's statements" were not within his job responsibilities. Pet. 23. But, as noted above, the *Garcetti* inquiry is a practical one, focusing on what the employee "was employed to do." *Garcetti*, 547 U.S. at 421. As his supervisors, defendants did not need to await a court ruling to know what duties he "actually [was] expected to perform." *Id.* at 424-25. They would have been the ones actually to expect him to perform those duties.

Finally, Petitioners repeatedly assert that the "key evidentiary facts regarding context and content" are undisputed. Pet. 20. But the facts regarding the scope of Eng's duties are *not* undisputed. The parties disagree, for example, about whether members of the task force were expected to share concerns about "any aspect of the investigation" with each other and their superiors, particularly about whether they were expected to share any concerns they might have related to aspects of the investigation outside of their assignment areas. Ct. App. ER 676. In any event, to the extent that Petitioners' claims are just a disagreement with the district court over whether the parties' evidence in fact demonstrated a

genuine issue of material fact, that issue is not the proper subject of an interlocutory appeal. Defendants in a qualified immunity case "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

2. Even if the scope and content of Eng's professional duties were a question of law, the lower courts would have been correct to deny defendants' motion. *Garcetti* held that a public employee's speech is not protected if it was part of his employment duties, i.e. the work he "was paid to perform." 547 U.S. at 422. Here, Eng's professional responsibilities were to investigate potential environmental law violations, make recommendations pertinent to the prosecutorial decision-making process with respect to his investigation, and contribute his written analysis to the final report. The comments for which he was retaliated against, however, related to alleged misconduct by other task force members in allegedly leaking false information to the IRS, and to the retaliation that took place against him after he spoke out about those allegations. Those comments were not part of the work that Eng "was employed to do." *Id.* at 421. Accordingly, his speech is not unprotected under *Garcetti*.

III. Petitioners Have Demonstrated No "Divergent Approaches" to the Factors That Courts Consider to Determine Whether Speech Is Employee Speech.

Petitioners also claim that this Court should grant review because "this case suggests at least implicitly," Pet.

26, that courts disagree as to the role that facts concerning "the person addressed," "time and place," and "specialized knowledge and access to information," play in determining whether speech was made as an employee. *Id.* at 26-29.[2] But Petitioners demonstrate no such disagreement —implicit or otherwise—between the decision below and other courts: None of the cases they cite on these factors holds them to be dispositive, and none holds speech to be unprotected employee speech where it does not relate to the employee's job responsibilities. *Cf. Garcetti*, 547 U.S. at 420-21 (noting that the facts that the plaintiff "expressed his views inside his office" and that his memo concerned "the subject matter of [his] employment" were not dispositive in determining whether he was speaking as a citizen or as an employee, but rather that the "controlling factor" was that his speech was made pursuant to his official job duties).

For example, Petitioners imply that the decision below is inconsistent with *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007), and *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008), because those cases "held that where the employee directed the speech to supervisors or others within the chain of command, the particular communication falls within the employee's official duties," Pet. 26, whereas the lower court did not hold that Eng's speech in front of

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[2]Petitioners also claim a lack of clarity over the role of "regulation[s], polic[ies], or statute[s] requiring employee's speech" in determining whether an employee spoke pursuant to his official duties. Pet. at 29-31. Given that there is no allegation here that Eng's speech was required by a regulation, policy, or statute, review in this case would not provide the guidance that Petitioners believe is lacking on that issue.

Cooley necessarily was made pursuant to his official duties. But although both *Haynes* and *Davis* ultimately concluded that speech that had been directed at supervisors was employee speech, neither case found that *all* speech directed at a supervisor is employee speech. In *Davis*, for instance, the court concluded that while some of Davis's speech to her supervisor was made as an employee, other speech was made as a citizen. The decisive factor was not the person addressed, but whether the speech was about her job duties. *See id.* at 313 ("[W]hen a public employee raises complaints or concerns up the chain of command at his workplace *about his job duties*, that speech is undertaken in the course of performing his job.") (emphasis added); *see also id.* at 313 n.3 ("We recognize that it is not dispositive that a public employee's statements are made internally."). Similarly, there is no inconsistency between the decision below and the cases Petitioners cite on "time and place" and "specialized knowledge," none of which holds, or even implies, that *all* speech made at a work-related function or based on information acquired while at work is made pursuant to official duties. *See, e.g.*, *Brammer-Hoelter*, 492 F.3d at 1204 ("[N]ot all speech that occurs at work is made pursuant to an employee's official duties.").

Each case that Petitioners cite conducts a fact-based, common-sense inquiry into whether a public employee is speaking as an employee or as a citizen. Each considers whether the employee spoke pursuant to his official duties to be the controlling factor, and each looks at facts related to the speech and to the person's employment responsibilities to determine whether the speech was pursuant to those duties. None holds that any one of the

factors identified by Petitioners is dispositive, and none concludes that speech that does not relate to the employee's job responsibilities is unprotected as employee speech. To be sure, courts have not specified which facts will be most significant in each conceivable factual context that might arise, but supervisors are not entitled to qualified immunity every time a court has not ruled on the particular set of facts before it. Petitioners have shown no "divergent approaches" among courts, Pet. 31—let alone that all "supervisory personnel should surely be entitled to qualified immunity," *id.* at 25—and the petition should be denied.

IV. This Court Should Not Grant Review to Determine Whether a Public Employee Has a First Amendment Interest in His Attorney's Speech on His Behalf.

In their fourth question presented, Petitioners ask this Court to grant review "to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly." Pet. 9. But the court below did not hold that employee speech has greater protection when transmitted through an attorney than if the employee were speaking directly: It held that Geragos's "words were Eng's words as far as the First Amendment is concerned," Pet. App. 17, and analyzed Geragos's speech under the test used for employee speech. *See, e.g.*, *id.* at 24 (noting that Geragos's statements addressed matters of public concern). In other words, whether the speech is made by the employee himself or by his attorney, the *Garcetti* inquiry remains the same: Was the speech made pursuant to the employee's official job duties? *See id.* at 25

(explaining that there was no doubt that facts could indicate that Eng "had no official duty . . . to authorize Geragos to speak to the press about the retaliation being taken against him").

In any event, the court below was correct in holding that employees have a First Amendment interest in their attorneys' speech on their behalf. As the court explained, "[i]t is well settled that when a lawyer speaks on behalf of a client, the lawyer's right to speak 'is almost always grounded in the rights of the client, rather than any independent rights of the attorney.'" *Id.* at 14 (quoting *Mezibov v. Allen*, 411 F.3d 712, 718, 720 (6th Cir. 2005)) (citation omitted). And even if the court below were not correct that Eng had a personal interest in Geragos's speech, granting review would not resolve Eng's claims based on Geragos's speech, because the district court also held that Eng could assert third-party standing to vindicate Geragos's interests, and the court of appeals lacked jurisdiction to consider that issue. *See id.* at 12-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The
Supreme Court of the United States

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, and CURTIS HAZELL,

Petitioners,

v.

DAVID ENG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent David Eng ("Eng") makes four arguments for denying the petition, three on the "official duties" issue presented by the holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and one regarding the scope of a public employee's First Amendment interest in his or her attorney's interview by the press. None withstand scrutiny.

First, Eng denies there is a circuit conflict on whether the determination of whether a public employee's speech was pursuant to job duties is a question of law for the court, or a mixed question of law and fact requiring initial determination by a jury. But the Ninth Circuit itself expressly recognized the split among circuits in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("[o]ur sister circuits are split over the resolution of this question").

Second, Eng contends the decision below is correct because, among other things, the inquiry into the scope of an employee's professional duties is "a practical one," according to this Court's instruction in *Garcetti*, and thus must be one for the jury. However, courts are not beyond engaging in practical inquiries that require factual analysis. Significantly, Eng omits any explanation as to how the factual analysis on scope of employment differs in nature from the factual analysis in which courts engage to determine whether speech is a matter of public concern or whether the employee's interests are outweighed by

the employer's. And if the decision below is correct, as Eng contends, all the more reason to grant the petition, because a majority of circuits are depriving plaintiffs of their Seventh Amendment right to a jury trial on issues of fact by concluding the *Garcetti* inquiry presents a question of law.

Third, Eng denies any guidance is needed to resolve disagreements as to the factors to be considered in determining whether an employee was speaking as an employee or as a citizen, because he denies there are any disagreements. However, saying does not make it so. This Court recognized in *Garcetti* that an occasion would arise for it "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti*, 547 U.S. at 424. This case, in which the parties debate whether Eng's comments were within his official duties, is such an occasion.

Finally, Eng perceives no problem of a possible end-run around *Garcetti* under the Ninth Circuit's broadly-stated rule that a public employee has a personal First Amendment interest in what his or her attorney says to the press, contending the *Garcetti* inquiry remains the same whoever is speaking. But *Garcetti* posits limits on a public employee's speech rights, whereas, according to the Ninth Circuit, advocacy, even before the press, must be unfettered. Rather than being consistent with *Garcetti*, the Ninth Circuit's rule preempts it.

As petitioners explain below, Eng has provided no sound argument to deny the petition.

I. THERE IS AN UNDENIABLE CONFLICT BETWEEN CIRCUITS, RECOGNIZED BY EVEN THE NINTH CIRCUIT, ABOUT THE NATURE OF THE *GARCETTI* INQUIRY – WHETHER IT PRESENTS A QUESTION OF LAW FOR THE COURTS OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A JURY.

For more than twenty-five years, the question of the protected status of a public employee's speech has been one of law for the court to decide. *Connick v. Meyers*, 461 U.S. 138, 148 n.7 (1983). The Ninth Circuit has changed the rule, purportedly compelled by *Garcetti*. *See* Petition for Certiorari ("Pet.") 12-13. It has concluded that the question of the protected status of an employee's speech is no longer one that can be decided at summary judgment as a matter of law; a subpart of the question pertaining to the scope and content of a plaintiff's job responsibilities is one of fact and requires an initial determination by the jury. *Posey*, 546 F.3d at 1123-30; Appendix ("App.") 20. If the employee asserts that the particular speech at issue was not part of his or her job and the employer asserts that it was, the jury resolves the issue, even in the absence of any conflict in the evidence about what was said, or where or when it was said.

Eng contends that the Ninth Circuit's new rule is not in conflict with other circuits. He simply ignores the fact that the Ninth Circuit itself in *Posey* recognized the split in the circuits, citing to some of the very cases Eng attempts to show are not in conflict. For example, Eng says of the Fifth Circuit decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), that the court stated only that the ultimate question of whether speech is entitled to protection is a matter of law, without mentioning any material dispute over the scope and conduct of the plaintiff's job responsibilities and without addressing whether it would have resolved such a dispute, if it existed, at summary judgment. Opposition ("Opp.") 9-10. However, as the *Posey* court pointed out in addressing *Charles v. Grief* (546 F.3d at 1127), there was such a dispute at summary judgment, and the magistrate judge had concluded the question whether the plaintiff's statements were made as a citizen or as an employee presented a genuine issue of material fact requiring trial. *Charles v. Grief*, 522 F.3d at 513 n.17. The Fifth Circuit reversed, concluding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles' speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Id.*

Citing to the recent case, *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 703-06 (9th Cir. 2009), Eng contends that in any event, when there is no dispute about the scope of an employee's duties, the

Ninth Circuit does decide the issue of whether a plaintiff spoke as a citizen or as an employee as a matter of law. Opp. 11. In *Huppert*, the district court dismissed the plaintiffs' First Amendment claims on summary judgment after concluding the statements at issue were unprotected because they were not made by the employees acting as private citizens. 574 F.3d at 701. The reviewing court affirmed the district court over a dissent. *Id.* at 710. The dissent took issue with the majority's purported failure to follow binding precedent set in the instant case, among others; if the employee states his speech was not part of his official duties, a jury must decide the scope of his or her employment. *Id.* at 718-19, 722 (Fletcher, J., dissenting). The only occasion permitting a court to determine the scope of employment issue as a matter of law, according to the dissent, is one in which an employee concedes the particular speech at issue was part of explicitly assigned duties. *Id.* at 712, 719 (Huppert conceded he was selected by District Attorney to investigate corruption at public works yard).

In *Huppert*, as in this case, there was no dispute about underlying facts as to what had occurred.[1]

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[1] Eng purports to have discovered a conflict in the underlying facts in this case, stating the parties disagree "whether members of the task force were expected to share concerns" with superiors about "aspects of the investigation outside their assignment areas." Opp. 13. This is simply the *Garcetti* debate – job responsibility or not – stated in terms of the specific context of the case.

Huppert illustrates that the undeniable split evident among the circuits over whether the protected status of speech remains an issue of law for a court to decide, exists as well within the Ninth Circuit, underscoring the need for this Court to address and resolve this important issue.

Citing to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a product disparagement case, Eng asserts that the decision below was correct because an issue with a factual component cannot be determined as a matter of law; the inquiry is "a practical one." Opp. 12 & n.1. However, an issue with a factual component is not off-limits to a court. As this Court explained in *Connick*, in light of its obligations under the Constitution,

> [W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect. Because of this obligation, we cannot avoid making an independent constitutional judgment on the facts of the case. 461 U.S. at 150 n.10 (internal quotations and citations omitted).

Eng does not explain why the factual analysis of circumstances required for a determination of scope of employment for First Amendment purposes is any different from that which is engaged in by courts to determine whether, for example, a particular speech touches on a matter of public concern. *See* Pet. 18-22.

Moreover, in the employee speech context, the analysis of "the statements in issue and the circumstances under which they are made" has heretofore occurred at the threshold, to determine if the statements are protected; if so, the jury then determines whether, in fact, protected speech motivated the employer to act against the employee in some manner. Eng does not explain why the citizen-or-employee subpart of the protected status analysis must now be kept from the court until after a jury has made an initial determination, as in *Bose*. There is a compelling reason for the *Garcetti* inquiry not to be delayed, which does not pertain in *Bose* – qualified immunity. *See* Pet. 22-25. When the Ninth Circuit imported the *Bose* analysis into the context of public employee speech rights (*see Posey*, 546 F.3d at 1129), it eviscerated the qualified immunity defense. When, as here, an employee contends it was not part of his job to make a particular statement, the question of whether or not it was must now be put to the jury, thereby precluding qualified immunity, as well as interlocutory review of its denial. App. 10; *Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995).

Eng takes the position that qualified immunity would not apply in any event: since the *Garcetti* inquiry focuses on what the employee "was employed to do," supervisors, as supervisors, would naturally know what the employee's duties are and would not need a court to tell them. Opp. 13; *Garcetti*, 547 U.S. at 421. This contention at best indicates some confusion about standards for determining the scope of

employment issue (*see* § II, *infra*), but it certainly is not an adequate answer to the fact that the Ninth Circuit has undermined the important interest that qualified immunity is designed to advance. This unacceptable consequence to the qualified immunity defense, which stems from deeming the question whether an employee spoke as an employee or a citizen to be a mixed question of law and fact, is an important reason in itself to grant the petition.

II. COURTS AND EMPLOYERS NEED THE GUIDANCE OF THIS COURT ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

Petitioners have demonstrated that the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job is now needed in light of apparent disagreement about what factors are significant to the analysis. Pet. 25-32. Eng denies that any guidance is necessary, even presumably for a jury if indeed this issue is one of fact. He appears to assert that no courts have held particular factors to be dispositive, no courts have made the mistake of holding speech outside the scope of a job is unprotected, and hence there is no sign of disagreement as to the role various factors should play in the analysis to warrant review. Opp. 15.

But there is disagreement, and it is occurring even among judges in the Ninth Circuit, as is evident, for example, in the recent decision in *Huppert*, 574 F.3d 696. The *Huppert* majority found a police officer's grand jury testimony on a criminal matter owed its existence to his professional responsibilities under California law, and so was unprotected. 574 F.3d at 707-09. In so doing, the court declined to follow the Third Circuit's decision in *Reilly v. Atlantic City*, 532 F.3d 216 (3d Cir. 2008), in which a police officer's trial testimony in a criminal matter was deemed to be protected. *Id.* at 708. The dissent in *Huppert* would have followed *Reilly* and asserted that a public employee has a duty as a citizen to testify before a grand jury independent of any duty he or she might have as an employee, and so such testimony is protected speech by nature. *Id.* at 720-22 (Fletcher, J., dissenting).

Moreover, Eng's assertion on what he sees as the non-problem of qualified immunity is based on an assumption that appears to conflict with this Court's own views. Eng states that supervisors do not need to have a court tell them what duties the employee was expected to perform because "[t]hey would have been the ones actually to expect them to perform those duties." Opp. 13. The underlying assumption is that an employee is always speaking as a citizen *unless* the employer or supervisor has actually assigned the employee the task of making the particular speech or the particular speech was actually part of the employee's official duties. *See Alaska v. EEOC*, 564

F.3d 1062, 1070-71 (9th Cir. 2009) (employee's "official duties didn't require her to complain about the conditions of [another employee's] employment or to bring the alleged sexual harassment to the public's attention"). This assumption is in apparent conflict with this Court's admonition that an official job description (or assignment) is not dispositive for distinguishing between public and private speech. *Garcetti*, 547 U.S. at 424-25.

Eng also asserts that in each case cited by petitioners, "whether the employee spoke pursuant to his official duties [is] the controlling factor[.]" Opp. 16. But whether the employee spoke pursuant to his official duties is not a factor controlling the analysis, but the legal conclusion to be reached at the end of the analysis; it is the "fact-based, common-sense inquiry" (*id.*) to reach that legal conclusion which needs the analytical framework that in *Garcetti* it was unnecessary to provide. To say, in essence as Eng does, that every case is different on the facts, only proves the need for guidance without which employees and supervisors face the uncertain prospect of litigation each time they decide to take corrective action for something said.

III. REVIEW IS NECESSARY TO DETERMINE THE SCOPE OF THE FIRST AMENDMENT INTEREST A PUBLIC EMPLOYEE MAY HAVE IN AN INTERVIEW GIVEN BY HIS OR HER ATTORNEY TO THE PRESS.

On the issue of a client's First Amendment interest in his or her attorney's statement to the press, Eng states that review is unwarranted because the Ninth Circuit did not hold that employee speech has greater protection when transmitted through an attorney than it would were the employee speaking directly. Opp. 17. Not in so many words, perhaps, but that is the real risk of its holding. The court reasoned that the client has a First Amendment right to retain counsel and that it follows that the client has a First Amendment interest in what counsel says, wherever counsel says it – in court or to the press. App. 14-16. In other words, it is in the advocacy of the attorney that the client's First Amendment interest lies, regardless of whether what is said would or would not be protected if spoken directly by the client.

Eng asserts, "whether the speech is made by the employee himself or by his attorney, the *Garcetti* inquiry remains the same: Was the speech made pursuant to the employee's official job duties?" Opp. 17. But the Ninth Circuit's broad rule that a client has a protected First Amendment right in what counsel says on his or her behalf *preempts* the *Garcetti* inquiry. The *Garcetti* inquiry involves the possibility of limits on a public employee's First Amendment rights. In contrast, any First Amendment interest in advocacy must be

"unfettered" lest advocacy be chilled. App. 16. If the client's message, regardless of content or context, delivered through his attorney is protected as "a natural corollary of the long-recognized First Amendment right to hire and consult an attorney" (App. 15), then it may well be that an employee's statements otherwise unprotected under *Garcetti*, or even under *Connick*, become protected merely by virtue of having been reported to the press by the employee's attorney.

Qualified immunity was denied on Eng's retaliation claim based on his attorney's press interview on the basis of a purported standard of "common sense," rather than on the basis of the traditional "clearly established law" standard. App. 33. The Court should grant the petition on this issue to reject the Ninth Circuit's common sense standard for qualified immunity and to make clear that retaining an attorney to speak to the press does not necessarily cause speech that might otherwise be unprotected by the First Amendment to become protected.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioners urge that the petition for a writ of certiorari be granted.

DATED: December 3, 2009

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